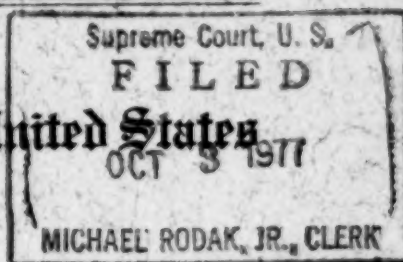


No. 77-510

In the Supreme Court of the United States

OCTOBER TERM, 1977



UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO**

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STATE OF NEW MEXICO

 PETITION FOR A WRIT OF CERTIORARI TO THE
 SUPREME COURT OF THE STATE OF NEW MEXICO

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court (App. A, *infra*, pp. 1a-11a) is reported at 564 P. 2d 615. The order entered on June 4, 1976, in the District Court of the Sixth Judicial District in and for Luna County, New Mexico (App. C, *infra*, pp. 14a-21a), and the findings of fact and conclusions of law of its special master filed May 5, 1975 (App. D, *infra*, pp. 22a-34a), are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on May 23, 1977 (App. B, *infra*, pp. 12a-13a). By order of August 11, 1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the United States is entitled under its reserved water rights to the use of water in a national forest for the purpose of minimum instream flows, recreation, and stockwatering, on the ground that these are valid purposes of a national forest under the Organic Administration Act of 1897.

STATUTES INVOLVED

Section 24 (since repealed) of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471; the relevant provisions of the Organic Administration Act of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 475, 481, 551; and the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, are set forth in Appendix E, *infra*, pp. 35a-39a.

STATEMENT

This state court litigation began in 1966 as a suit among private landowners over allegedly unlawful diversions of water from the Rio Mimbres in south-

western New Mexico. In 1970 the State of New Mexico intervened, seeking a general adjudication of all water rights to the entire stream system of the Rio Mimbres. Because the Rio Mimbres flows through Gila National Forest, the United States was joined as a state court defendant pursuant to the McCarran Amendment, 43 U.S.C. 666.¹ In its answer the United States, invoking the federal law of reserved water rights, claimed entitlement to as much water as was or might become necessary to fulfill the purposes of the Gila National Forest within the watershed of the Rio Mimbres (App. A, *infra*, pp. 1a-2a).²

The state court appointed a special master to determine the parties' water-rights claims. In the proceedings before the special master, the United States specified three purposes of the Gila National Forest for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national for-

¹ Originally enacted as Section 208 of the Department of Justice Appropriation Act of 1953, 66 Stat. 560, this statute gives consent to state court suits against the United States for the adjudication of water rights to a river system. See *Colorado River Conservation District v. United States*, 424 U.S. 800, 802-803, 807-809.

² The United States sought reserved water rights as of five possible priority dates, corresponding to the dates of successive presidential proclamations that set apart and reserved from entry five tracts of federal public land within the Rio Mimbres watershed for inclusion in Gila National Forest. The dates are March 2, 1899; July 21, 1905; February 6, 1907; June 18, 1908; and May 9, 1910. See 34 Stat. 3123, 3126, 3274; 35 Stat. 2190; 36 Stat. 2694.

est to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest Service, United States Department of Agriculture.³ The master allowed the United States' claims to reserved water in use as of December 27, 1972, for these purposes, all of which he recognized as valid purposes of the Gila National Forest (Findings 2, 5; Conclusions 4, 9, 10, 11; App. D, *infra*, pp. 25a-27a, 31a, 33a).⁴ At the same time, he ordered the United States to specify within a given time all of its future requirements for reserved water in terms of "priority, amount, purpose and periods and place of use" (App. D, *infra*, p. 34a).

Respondent then submitted to the state district court its objections to the master's report. In these objections, as supplemented by briefs and a proposed

³ Before the special master the paramount issue between the parties was not whether the United States was entitled to water for these specified purposes, but whether the United States was required to quantify its reserved water rights. Respondent conceded in its prehearing brief that recreation was a valid purpose of national forests (Transcript of Record 467). This concession was repudiated by respondent in later proceedings in the state district court (Transcript of Record 378-379; Supplemental Transcript of Record 37).

⁴ The United States was allowed water for instream flow maintenance in the amount of 2 cubic feet per second at each of the three designated points on the river. The master found that there were no private appropriators upstream from these points (Finding 3; App. D, *infra*, p. 27a).

order, respondent argued that the United States had no reserved rights to water for instream flow maintenance, for recreational activity, or for stockwatering, because they were not valid purposes of a national forest. On June 4, 1976, the state district court entered an order upholding respondent's objections and modifying the master's report accordingly (App. C, *infra*, pp. 14a-21a).

The Supreme Court of New Mexico affirmed (App. A, *infra*, pp. 1a-11a). It held that the United States possesses reserved water rights in waters appurtenant to a national forest only when the original purposes for which the forest was established "necessarily require" such a reservation, and that the original purposes of national forests are limited to those explicitly set forth in the Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. 475 (App. A, *infra*, p. 6a). Although the court stated that the Act "limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber" (*ibid.*), it then discarded the first purpose and concluded "that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber" (*id.* at 10a). The court stated that "[r]ecreational purposes and minimum instream flows were not contemplated" (*ibid.*).⁵

⁵ With respect to the use of water for stockwatering by holders of federal grazing permits, the court held that those water rights must be established by the individual permittees

REASONS FOR GRANTING THE PETITION

"It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804. Against this background, the New Mexico Supreme Court has denied the United States essential reserved water rights within the Gila National Forest for maintenance of minimum instream flows, recreation, and stockwatering. The decision derogates from the original purposes and uses of the national forests and conflicts with the decision of this Court in *Arizona v. California*, 373 U.S. 546; it also contradicts nearly eight decades of legislative and administrative understanding. If permitted to stand, it will threaten the ecology and restrict the use of more than 7 million acres of national forest land in New Mexico, and will jeopardize the reserved water rights of the United States in national forests throughout the West.

1. The court's decision, unless reversed, will impede the husbandry and inhibit the use of our national forests.* Full care and use of the forests is not pos-

under the state law of prior appropriation, and could not be claimed by the United States under the federal law of reserved water rights, since "the United States does not have reserved water rights in the forests for these permitted uses" (*id.* at 10a-11a).

* Under Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792, the President is now forbidden from withdrawing any part of the public domain to enlarge the inventory of the National Forest System. The President is also forbidden by Section 11

sible without adequate water. Yet the New Mexico Supreme Court has cut off water to 7,793,195 acres of national forest land within that state for any purpose other than "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (App. A, *infra*, p. 10a). Its decision may also affect state and federal cases involving water rights appurtenant to at least 17 other national forests in other states.⁷

(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974, 88 Stat. 476, 480, 16 U.S.C. (Supp. V) 1609(a), as amended by Section 9 of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2957, from returning National Forest System lands to the public domain. In consequence, the enlargement or reduction of public-domain acreage in the National Forest System can now be accomplished only by an act of Congress. The National Forest System presently comprises 153,909,368 acres previously withdrawn from the public domain.

⁷ *Avondale Irrigation District v. North Idaho Properties, Inc.*; *United States v. Higginson* (No. 12174), and *Soderman v. Kackley* (No. 12482), argued and submitted on September 7, 1977, to the Supreme Court of Idaho, involve reserved water rights in Coeur d'Alene and Caribou National Forests. Applications of the United States pending in the District Courts of the State of Colorado in and for Water Division 1 (No. W8439), Water Division 4 (Nos. W425-W438), Water Division 5 (Nos. W467-W469), Water Division 6 (Nos. W85-W86), and Water Division 7 (No. W4667) involve waters appurtenant to Arapaho, Grand Mesa, Gunnison, Manti La Sal, Pike, Roosevelt, Routt, San Juan, Uncompahgre, and White River National Forests. A general adjudication of all water rights in the Bighorn River system in Wyoming was instituted January 25, 1977, in the District Court of the Fifth Judicial District of the State of Wyoming in and for Washakie County (No. 4993) and involves waters appurtenant to Bridger and Teton National Forests. Claims in *United States*

The mischief, once done, cannot easily be undone. Under the reserved-water-rights doctrine, "the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert v. United States*, 426 U.S. 128, 138. If the United States has not already acquired property rights in waters for the national forests, prior appropriators may have claims superior to any future federal claim to those waters. Congress thus may be unable to overrule the New Mexico court's decision or to reaffirm prior federal rights in other national forest areas where water rights are now placed at issue, at least without needless resort to its power of eminent domain.^{7a} In these circumstances, we submit, prompt review by this Court is appropriate.

2. "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, *supra*, 426 U.S. at 138. "[T]he

v. Benadair (D. Ore., Civil No. 75-914) involve waters appurtenant to Winema National Forest. Claims in *United States v. Truckee-Carson Irrigation District* (D. Nev., Civil No. R-2987 JBA) involve waters appurtenant to Toiyabe National Forest. Claims in *United States v. Tongue River Water Users Association* (D. Mont., Civil No. CV-75-20-Blg) involve waters appurtenant to Custer National Forest.

^{7a} Although decrees in general adjudications of water rights frequently remain open in the event of changing uses or conditions, no allowance of water for the specified uses at issue here is considered likely to occur.

issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* at 139. But the withdrawal of land from the public domain "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141.

In this case, the New Mexico Supreme Court found that the purposes of the Gila National Forest were only "to insure favorable conditions of water flow and to furnish a continuous supply of timber," and that "[r]ecreational purposes and minimum instream flows were not contemplated." App. A, *infra*, p. 10a. This narrow view misconceives the congressional intent in establishing the national forests and disregards other important purposes for which they were created.

a. The New Mexico Supreme Court purported to base its decision on the text of the Organic Administration Act of 1897 ("Organic Act"), 30 Stat. 11, 34-35, 16 U.S.C. 475.⁸ The specific language relied on by the court (App. A, *infra*, p. 6a) reads:

⁸ Subsequent citations to the Organic Act will be to the appropriate section of Title 16, United States Code. The Organic Act was engrafted as a rider (30 Cong. Rec. 899 (1897)) to the Sundry Civil Expense Appropriations Act of June 4, 1897, 30 Stat. 11, and comprised the sixth (30 Stat. 34) through twentieth (30 Stat. 36) unnumbered paragraphs after the heading "SURVEYING THE PUBLIC LANDS" (30 Stat. 32). Substantially all such paragraphs, except paragraph 12 (16 U.S.C. (1970 ed.) 476), remain the law today. Paragraph 12 formerly governed sales of national-forest timber and was repealed by Section 13 of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2958.

Purposes For Which National Forests May Be Established And Administered.

* * * No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

On its face, this language identifies three purposes that justify establishment of a national forest, purposes stated by the court itself as follows (App. A, *infra*, p. 6a): "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." The court, however, discarded without explanation the first purpose and concluded "that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber" (*id.* at 10a). The court then declared, again without explanation, that neither purpose encompassed use or water for recreation or for maintenance of minimum instream flows (*ibid.*).

In fact, the government's claim of reserved water rights for maintenance of minimum instream flows falls squarely within the purpose of "securing favor-

able conditions of water flows." Moreover, minimum streamflows are essential to the objective of "improving and protecting the forest." Although the special master in this case indicated that instream flow maintenance was for "fish" purposes (App. D, *infra*, p. 26a)—perhaps in deference to the endangered Gila trout—minimum streamflows also provide erosion control, fire protection, and protection for the watershed and the wildlife habitat. All of these are necessary for the Secretary of Agriculture to fulfill the duty imposed on him by the Organic Act "to preserve the forests * * * from destruction." 16 U.S.C. 551.

The New Mexico Supreme Court by its grudging interpretation of the Organic Act has failed to recognize that a national forest consists of more than trees to be harvested and a watershed to be tapped. The forest is, among other things, the wildlife living within it. By denying minimum instream flows for wildlife protection and for the fish that require those amounts of water, the court ignored the relationships among the living things in the forest that preserve the ecological balance and keep the forest healthy. Assurance of sufficient stream flows to nourish and preserve the entire forest—not simply the timber in the trees—is within the Organic Act's purpose "to improve and protect the forest."

In addition to the language, the legislative history of the Organic Act demonstrates that erosion control and general ecosystem and watershed management were important parts of the statutory purposes. Representative McRae, a sponsor of the Act, emphasized

that a crucial forest purpose was "to conserve the water flows" (30 Cong. Rec. 967 (1897)). He asserted the need to regulate timber-cutting and preserve the ground cover for retention of water and prevention of destructive floods (30 Cong. Rec. 966 (1897), to furnish a stable, steady flow for "navigation" or for "irrigation of the deserts" (*ibid.*), and to preserve "forest conditions upon which water conditions and water flow are dependent" (*ibid.*).⁹ The Organic Act, of course, requires that timber-cutting and the maintenance of "favorable conditions of water flows" be reconciled with the purpose of "improv[ing] and protect[ing] the forest." The right to minimum stream flows asserted here operates to satisfy all these statutory dictates through judicious watershed management.

Moreover, the duty of fish and wildlife protection in the national forests was incorporated into early

⁹ This view was shared by the Act's opponents. Representative Ellis criticized the bill and the recent establishment of forest reserves by President Cleveland, claiming that both were intended for the purpose of "the preservation of the water supply" (30 Cong. Rec. 1007 (1897)). Senator Stewart, another critic, asserted that private settlers rather than federal agencies enforcing the Organic Act would be the "best guardians" for "protecting the streams for irrigating purposes" (30 Cong. Rec. 1280 (1897)). Representative Loud objected to two of the Act's purposes, timber-cutting and "keeping the snows upon the mountains" (30 Cong. Rec. 1399 (1897)). He claimed that these purposes were incompatible, and observed that existing forest reserves in California had as their "only object" the retention of mountain snows so as not to "bring down all at once the full flood ~~upon~~ valleys" (*ibid.*). *supra*

congressional appropriations. In 1899, "forest agents" were required to "aid in the enforcement of the laws of the State or Territory * * * in relation to the protection of fish and game."¹⁰ In the Department of Agriculture Appropriations Act of March 4, 1907, 34 Stat. 1256, 1270, Congress included among the functions of the new Forest Service the responsibility to "care for fish and game supplied to stock the national forests or the waters therein." Such enactments demonstrate a congressional intention to protect fish and wildlife resources in national forests. *Brooks v. Dewar*, 313 U.S. 354, 361.

b. The legislative and administrative record both before and since the Organic Act demonstrates consistently that the purposes for which Congress established the national forests also include recreation. The "Creative Act" of March 3, 1891, 26 Stat. 1095, 1103 (former Section 24), the first legislative act providing for the establishment of national forests,¹¹ authorized the President to reserve from the public domain, as "forest reserves," public lands "wholly or in part covered with timber or undergrowth, whether of commercial value or not." Although the Act said

¹⁰ Sundry Civil Expense Appropriations Act of March 3, 1899, 30 Stat. 1074, 1095; repeated in Department of Agriculture Appropriations Acts of March 3, 1905, 33 Stat. 861, 872-873, June 30, 1906, 34 Stat. 669, 683, and March 4, 1907, 34 Stat. 1256, 1269.

¹¹ The Creative Act was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. See note 6, *supra*.

nothing about the purposes of such reservations, the Chief of the Forestry Division of the Department of Agriculture (B. E. Fernow) promptly construed it to include recreational use. *Report of the Chief of the Division of Forestry*, p. 224 (1891):

* * * There can hardly be any doubt, however, as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more specially for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purpose of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from a timbered area by cutting judiciously and with a view to reproduction. *Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate, but the first class is infinitely more important, and the second is easily provided for in securing the first. [Emphasis supplied.]*

The responsible administrative official thus recognized that aesthetic and recreational purposes, while "[s]econdary objects" of the national forests, were equally

"legitimate" ones which could be promoted consistently and simultaneously with the more important economic objectives. All the purposes of the Creative Act, he noted, could be achieved by proper forest management through "regulation of the occupancy and use of the reservation" (*id.* at 226).

This administrative policy was part of the background for passage of the Organic Act six years later. See page 9, *supra*. This Act did not narrow the purposes for which national forests could be established, except by disqualifying those public lands that were worth more for minerals or agriculture "than for forest purposes." The Act's first stated purpose, "to improve and protect the forest," was consistent with those "[s]econdary objects" noted in the Fernow Report: "to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure." Moreover, the Act authorized the Secretary of Agriculture (16 U.S.C. 551) to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." "[O]ccupancy and use" plainly contemplate purposes additional to water flow and timber supply, the only two recognized by the New Mexico Supreme Court. In fact, the statutory command "to regulate their occupancy and use" is virtually a verbatim repetition of the method proposed by Chief Forester Fernow in 1891 to accomplish all the forest purposes he identified (pp. 14-15,

supra).¹² Fernow's view of the national forests as "places of retreat for those in quest of health, recreation, and pleasure"—which was very early true of the Gila National Forest¹³—was also echoed and approved by a provision of the Organic Act (16 U.S.C. 478) authorizing entry by "any person" on the national forests "for all proper and lawful purposes," provided the visitor complied with the "rules and regulations covering such national forests."

¹² The New Mexico Supreme Court sought to draw a distinction between "uses" and "purposes" of the national forests, arguing that a decision by Congress to open the national forests "for the many diversified uses which are now allowed does not expand the purposes for which they were originally created." App. A, *infra*, pp. 7a-8a. This position obscures the fact that the "uses" here in question, such as recreation, were known to and contemplated by Congress from the very beginning. There is no reason to suppose that this Court in *Cappaert v. United States*, *supra*, intended to limit the federal government's reserved water rights to the *primary* purposes of a reservation of public lands, thereby foreclosing for lack of water all secondary purposes that were within the original contemplation of Congress. Applying the "intent" test of *Cappaert*, see pp. 8-9, *supra*, it is unlikely that Congress, while recognizing that national forests would serve various useful purposes, intended to reserve only enough water to achieve a fraction of them.

¹³ Visits to the Gila Cliff Dwellings (made a national monument in 1907, 35 Stat. 2162) and Gila Hot Springs, both located in the Gila National Forest, predated establishment of the forest and continue to this day. In 1906, the Gila National Forest was visited by 108,700 persons. See Gila National Forest Recreation Management Plan, 1964, p. 3.

Roughly contemporaneous materials evinced a continuing concern for the recreational value of the national forests. By the Act of February 28, 1899, 30 Stat. 908, 16 U.S.C. 495, Congress authorized the leasing of national-forest land near springs for resort hotels. *The 1902 Forest Reserve Manual* (p. 8) stated:

All law abiding people are permitted to travel in forest reserves for the purpose of prospecting, surveying, to go to and from their own lands or claims, and for pleasure and recreation.

Regulation 42 in the Forest Service's 1905 publication, *Use of the National Forest Reserves*, provided:

Hotels, stores, mills, summer residences, and similar establishments will be allowed upon reserve lands wherever the demand is legitimate and consistent with the best interests of the reserve.

Similarly, the *Forest Service Atlas* for 1907 (p. 20) indicates that permits for boating, fish hatcheries, hotels, hunting, charcoal pits, cabins, camping, resorts, and trout ponds were routinely issued.¹⁴

¹⁴ The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, provides in part:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation

c. So far as stockwatering is concerned, this Court has recognized that reasonable stockwatering may be a legitimate use of a national forest under the Organic Act. In *United States v. Grimaud*, 220 U.S. 506, 516, the Court stated:

To pasture sheep and cattle on the [national-forest] reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The deter-

of, the purposes for which the national forests were established as set forth in section 475 of this title.

Construing that language, the New Mexico Supreme Court said: "The fact that Congress declared [the additional purposes] to be 'supplemental to' the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act." App. A, *infra*, p. 10a. We disagree. In our view, that language merely makes explicit a policy that has been recognized since passage of the Organic Act in 1897. As the House and Senate Reports accompanying the 1960 Act stated:

[I]n any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. Rep. No. 1551, 86th Cong., 2d Sess., p. 4 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess., p. 4 (1960).

mination of such questions, however, was a matter of administrative detail.

See also *Light v. United States*, 220 U.S. 523. In recognition of this principle, the Forest Service has established a system of special-use permits to control access to grazing areas and waters.

The decision of the New Mexico Supreme Court would require each stockowner holding a federal grazing permit to obtain an individual adjudication of his or her water rights under state law. The Gila National Forest has been part of ranching country for 100 years, and at present 160 permit holders run more than 29,000 cattle in the forest.¹⁵ To require these permit holders to adjudicate their water rights individually would place an unreasonable burden on federal range management and impair federal control of federal lands. Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 542-543.

3. In contrast to the New Mexico Supreme Court's narrow view of the purposes of the national forests and the scope of the federal government's reserved rights in waters appurtenant to them, this Court has recognized that the government has reserved water in national forests—and in Gila National Forest in particular—for a variety of purposes, including all those at issue here. In *Arizona v. California*, 373 U.S. 546, decree entered, 376 U.S. 340, the special master con-

¹⁵ U.S. Forest Service, *Men Who Matched the Mountains: The Forest Service in the Southwest*, p. 204 (GPO, 1972).

cluded that eleven national forests, including part of the Gila National Forest, were entitled to reserved water for the following purposes:

(1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering.

Special Master's Report, December 5, 1960, p. 96. Pursuant to that report, this Court determined that the reserved water claims of the United States for national forest and other uses should be allowed. 373 U.S. at 595, 601. Although the Court's decision involved waters of the Gila River, not the Rio Mimbres, the purposes for which the United States could reserve water in the Gila National Forest were established by the decision and should be controlling here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

EDMUND B. CLARK,
DIRK D. SNEL,
Attorneys.

OCTOBER 1977.

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,094

MIMBRES VALLEY IRRIGATION Co.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Norman Hodges, District Judge

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to
enjoin alleged illegal diversions of the Rio Mimbres

which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e)(2)¹, objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for

¹ Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in *United States v. Winters*, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the *Winters* case has been subject to inconclusive debate through the years. It was further clarified, however, in *Arizona v. California*, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the *Winters* doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National

Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In *Cappeart v. United States*, 426 U.S. 128 (1976), the Court stated:

[W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created (Citations omitted.)

426 U.S. at 139.

The implied - reservation - of - water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more (Citation omitted.)

Id. at 141.

The *Cappeart* decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in *Arizona v. California*² concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the *Cappeart* Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

² 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat.Res.Law. 503 (1974). The pertinent provision of that Act reads as follows:

§ 475. Purposes For Which National Forests
May Be Established And Administered.

... No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, rec-

reational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911); *United States v. Hunt*, 19 F.2d 634 (N.D. Ariz. 1927); *Honchok v. Hardin*, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not ex-

pand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and,

as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

"The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

. . . .

[F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service

. . .

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior

discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Justice

/s/ Mack Easley
MACK EASLEY
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
LUNA COUNTY

Monday, May 23, 1977

No. 11,094

MIMBRES VALLEY IRRIGATION Co.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE.

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is hereby remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

APPENDIX C

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed June 4, 1976]

ORDER SUSTAINING OBJECTIONS AND
MODIFYING FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T.

- 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.
- Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No.

9, a point of curve; thence Northwesterly on a $7^{\circ}50'$ curve to the left (chord bearing and distance $N.45^{\circ}54'W.$, 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence $N.1^{\circ}43'W.$, 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears $N.75^{\circ}30'W.$, 949.62 ft. dist.; thence $S.80^{\circ}00'E.$, 669.00 ft. to the Northeast Cor., thence $S.9^{\circ}55'W.$, 960 ft. to the Southeast Cor., thence $N.81^{\circ}00'W.$, 669.00 ft. to the Southwest Cor.; thence $N.9^{\circ}57'E.$, 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Find-

ing 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A. 1953.

DONE this 26th day of March, 1976.

/s/ Norman Hodges
HON. NORMAN HODGES
District Judge

APPENDIX D

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed May 5, 1975]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the require-

ments and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21,

28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.
2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

26a

Location Sec., T., R.	U.S. Govern- ment Identifi- cation Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3- 2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908

27a

Location Sec., T., R.	U.S. Govern- ment Identifi- cation Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

- That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
- That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
- That said instream uses numbered 024, 511, and 786 can be made without interferring with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
- That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to

a point thirteen chains south of the north line of the southwest $\frac{1}{4}$ of Section 10; thence east to the west line of northeast $\frac{1}{4}$ of southwest corner of same; thence east along the south line of same and along south line of northwest $\frac{1}{4}$ of southeast $\frac{1}{4}$ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast $\frac{1}{4}$ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U. S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35,

and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29° 43'E., 37.30 ft. to Cor. No. 1-B; thence N. 60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89° 03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the

center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence N.1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as com-

pared to present uses and not in the category of minor, modest, or insignificant in amount.

12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such

- additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.
9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
 10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
 11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
 12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress

authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE
Special Master

May 2, 1975.

APPENDIX E

STATUTES INVOLVED

Creative Act

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471, was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. Prior to repeal, it read as follows:

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Organic Administration Act of 1897

Extracts from the Sundry Civil Expense Appropriations Act (or Organic Administration Act) of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 475, 481, 551, reads as follows:

[30 Stat. 34-35; 16 U.S.C. 475.] All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, un-

suspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act shall be as far as practicable controlled and administered with the following provisions:

[30 Stat. 35; 16 U.S.C. 475.] No public forest reservation ^[1] shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

[30 Stat. 35; 16 U.S.C. 551.] The Secretary of the Interior ^[2] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy

¹ On March 4, 1907, Congress redesignated the "forest reservations" or "forest reserves" as "national forests". 34 Stat. 1269.

² On February 1, 1905, Congress transferred control of the "forest reserves" from the Secretary of the Interior to the Secretary of Agriculture: 33 Stat. 628, 16 U.S.C. 472.

and use and to preserve the forests thereon from destruction; * * *

[30 Stat. 36; 16 U.S.C. 481.] All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Multiple-Use Sustained-Yield Act of 1960

This Act, 74 Stat. 215, 16 U.S.C. 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962, reads in its entirety as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the

combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

DEC 2 - 1977

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE AND
BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION**

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II

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IN THE Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42(3), the National Wildlife Federation, with its principal office at 1412 16th Street, N.W., Washington, D.C. 20036, and the New Mexico Wildlife Federation, with its principal office at 300 Val Verde, S.E., Albuquerque, New Mexico, 87108, move the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in the above-captioned case. Petitioner United States has consented to the filing of this brief; Respondent State of New Mexico has refused its consent.

The National Wildlife Federation, a nonprofit membership corporation organized under the laws of the District of Columbia in 1939, is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the National Forests. The Federation is the world's largest

conservation organization with a combined membership of over two million persons. Members of the Federation regularly use and enjoy the water resources of the National Forests for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group these individuals comprise a substantial number of public users of the National Forests.

The National Wildlife Federation has been involved with protection of the water resources of the National Forests on several fronts, including: testimony in support of comprehensive forest management legislation; administrative action limiting timber cutting to protect the Bachman's Warbler, an Endangered Species; publication of numerous articles in *National Wildlife Magazine* and *Conservation News* dealing with National Forest and water issues; submission of recommendations to the President's Water Resource Policy Study regarding use of the federal reserve rights doctrine for minimum stream-flow protection.

The New Mexico Wildlife Federation is a nonprofit organization incorporated under the laws of the State of New Mexico and dedicated to the wise use, preservation, aesthetic appreciation and restoration of wildlife and other natural resources. The New Mexico Wildlife Federation has a membership of approximately 4,840 individuals, many of whom regularly use and enjoy the water resources of the Gila National Forest for fishing, hunting, observation, and other forms of outdoor recreation.

This case presents a general issue of great and continuing concern to the National and New Mexico Wildlife Federations and to other public users of the National Forests: the maintenance of an adequate supply of water of sufficient quality to protect the public's interest in the public forest lands and resources. In the present case the specific question is whether the United States is entitled to reserved water rights in the Gila National Forest to

protect instream uses of water, including watershed management, fish and wildlife propagation, recreation, livestock watering, fire protection, endangered species protection, and vegetative growth. The New Mexico Supreme Court denied the United States a priority water right for these uses, holding that the Organic Administration Act of 1897, 16 U.S.C. 475, did not include minimum instream flows or recreational water uses within its express purposes. This holding, based upon a sweeping—and, we submit, erroneous—interpretation of the 1897 Organic Act, extends far beyond the boundaries of the Gila National Forest; it threatens the ability of the Forest Service to manage water supplies in the public interest on approximately 187 million acres of reserved forest lands nationwide.

The National and New Mexico Wildlife Federations submit the attached brief to articulate and defend the substantial public interest affected by this decision.

Respectfully submitted,

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Attorneys for Amici Curiae.

IN THE
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UNITED STATES OF AMERICA,
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STATE OF NEW MEXICO,
Respondent.

**BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION
IN SUPPORT OF THE PETITION FOR CERTIORARI**

INTEREST OF AMICI CURIAE

The interest of the National Wildlife Federation and the New Mexico Wildlife Federation is set forth in the Motion For Leave To File Brief As Amici Curiae, attached hereto.

REASONS FOR GRANTING THE PETITION

There are three separate grounds upon which the Petition For Certiorari should be granted: (1) the decision below is in conflict with this Court's opinion in *Arizona v. California*, 373 U.S. 546, (1963) decree entered, 376

U.S. 340 (1964); (2) the issue presented is nationally important, involving the constitutional authority of the United States to reserve land and water for public purposes; and (3) the New Mexico Supreme Court erred in its interpretation of federal law (i.e. the Organic Administration Act of 1897, 16 U.S.C. 475), and the decision of this Court in *Cappaert v. United States*, 426 U.S. 128 (1976).

1. Conflict

Rule 38(b) establishes "probable conflict" between a decision of the highest state court and this Court on a federal question as the principal ground for the grant of a petition for certiorari. Such a conflict is involved in the instant case.

In *Arizona v. California, supra*, this Court decreed that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest" 376 U.S. at 350. This decree was based upon the Special Master's Report which found that the Gila National Forest was established for the following purposes: (1) The protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Report of Special Master Simon H. Rifkind, p. 96. (Dec. 5, 1969) (emphasis added).¹

The New Mexico Supreme Court found exactly the opposite:

We thus conclude that the original purpose for which the Gila National Forest was created were to insure favorable conditions of waterflow and to furnish a

¹ These findings were specifically adopted by the Court. 373 U.S. at 601 (1963).

continuous supply of timber. *Recreational purposes and minimum instream flows were not contemplated. Mimbres Valley Irrigation Co. v. Salopek*, 564 P2d 615, at 617 (1977) (emphasis added).

Moreover, the New Mexico Supreme Court's interpretation of the 1897 Organic Act, i.e. that it does not include recreational purposes, is in conflict with the decisions of other federal courts. Cf. *United States v. Alpine Land and Reservoir Co.*, (unreported) D-183 BRT (D. Nev. 1975) (Forest Service claim to instream flows dating from creation of forest upheld); *Glenn v. United States*, (unreported) No. 153-61 (D. Utah 1963), (1897 Organic Act authorizes the United States to use forest water for recreational purposes).

In the face of these "probable"—indeed, near certain—conflicts, the petition for certiorari must be granted. *United States v. Oregon*, 366 U.S. 643, 645 (1961).

2. Importance

Even in the absence of conflict, the importance of the federal question presented in this case warrants review by this Court. *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961). First, the issue presented involves the application and effect of the constitutional doctrine of federal reserved water rights. The importance of this doctrine to the management of federal lands in the arid and semi-arid regions of the west has been emphasized repeatedly by this Court. Cf. *Arizona v. California, supra*; *Cappaert v. United States, supra*.

Second, the public interest in the use and enjoyment of the National Forests is directly involved. The effect of the decision below is to deny public recreational uses of the forest the protection of the reserved rights doctrine. This Court has consistently recognized that lower court decisions involving the use of the public lands are sub-

ject to special scrutiny. *United States v. Coleman*, 390 U.S. 599, 601 (1968).

Third, the question whether the 1897 Organic Act includes minimum streamflows and recreational uses among its purposes, though not novel, is still the subject of confusion among the state courts. Two cases pending before the Idaho Supreme Court illustrate the point. In *Soderman v. Kackley* (No. 12482), the Sixth Judicial District Court of Idaho found that the Forest Service was entitled to its claim of a non-consumptive use of the entire natural flow of three streams in the Coeur D'Alene National Forest. By contrast, the First Judicial District Court of Idaho, in *Avondale Irrigation District v. North Idaho Properties*, (No. 12174), denied a similar Forest Service claim, holding that non-consumptive (i.e. instream) uses were not within the purposes for which the Caribou National Forest was created.

These conflicting opinions constitute a hindrance to the effective administration of federal law, particularly the McCarran Amendment, 16 U.S.C. § 466, which grants the states concurrent jurisdiction to adjudicate federal water rights, including reserved rights. *United States v. Eagle County District Court*, 401 U.S. 520 (1971). Under these circumstances, the guidance of this Court would be beneficial to the lower courts—state and federal. *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1945).

3. Error

In holding that the Organic Administration Act of 1897 did not include instream and recreational uses of water among the purposes for which National Forests were to be established and administered, the New Mexico Supreme Court simply ignored the plain meaning of the statute. The language of the Organic Act is all-encompassing in its description of such purposes:

No National Forest shall be established, except to *improve and protect* the forest, or for the purpose of securing *favorable conditions of waterflows*, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States.

Clearly, utilizing streamflows for fish and wildlife propagation, recreation, fire protection, watershed management, livestock watering, and a host of other instream uses are designed to "improve and protect" the forest, within the meaning of the above-quoted provision. Moreover, it is difficult to envision a more appropriate way to secure "favorable conditions of waterflows" than by insisting on a minimum level of streamflow.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for certiorari.

Respectfully submitted,

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Washington, D.C. 20036

Attorneys for Amici Curiae.

December 1977

APPENDIX

Supreme Court, U. S.

FILED

FEB 23 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,

Petitioner

—v.—

STATE OF NEW MEXICO

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

**PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 3, 1977
CERTIORARI GRANTED JANUARY 9, 1978**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,

Petitioner

—v.—

STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

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SUPREME COURT OF THE
STATE OF NEW MEXICO

DATE	PROCEEDINGS
1976	
August 26	Skeleton transcript
September 2	Request for oral argument
November 9	Transcript of record (5 volumes)
November 9	Stipulation
December 22	Brief-in-chief
December 22	Certificate of service
1977	
January 10	Answer brief
January 10	Certificate of service (letter)
February 7	Argued and submitted
May 23	Opinion
May 23	Order affirming
June 3	Mandate
June 8	Receipt for mandate
1978	
January 13	Order U.S. Supreme Court granting certiorari

JUDGE'S DOCKET,
LUNA COUNTY, NEW MEXICO

Case No. 6326

MIMBRES VALLEY IRRIGATION COMPANY,
a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, d/b/a SALOPAK FARMS, &
HENRY SCHLOUTHER, LEE BAKER & J. W. HURT,
INTERVENORS

SOUTHERN PACIFIC & GUYTON B. HAYS,
Comm. of Public Lands of N.M., INTERVENOR, et al.

Nature of Action: Damages (by Diversion of water)

Benjamin M. Sherman, for Plaintiff

I. M. Smalley, E. L. Mechem, Attys White, Gilbert,
Koch & Kelly, William O. Jordan, Sp. Ass. Atty Gen.,
et al., Attorneys

DATE	PROCEEDINGS
1966	
Mar. 21	Adv. St. & Co. fees
Mar. 21	Filing Complaint
Mar. 21	Issuing Summons & copies
Mar. 22	Filing & Entering Temporary Restraining Order & Order to Show Cause
Mar. 22	Filing & Entering Bond
Mar. 28	Issuing Subpoenas & copies to Victor Trujillo & Lewis Putnam
Mar. 28	Filing Summons & Sheriff's Return (Tony Salopak)

DATE	PROCEEDINGS
1966	
Mar. 28	Filing Summons & Sheriff's Return (Henry Schlouther) & Aff. of Serv.
Mar. 28	Filing Motion
Mar. 28	Filing & Entering Order Nunc Pro Tunc
Mar. 29	Filing Motion to Dismiss
Mar. 29	Filing Answer of Henry Schlothauer
Apr. 4	Filing & Entering Temp. Injunction (Dated 3/31/66)
Apr. 4	Filing Motion & Notice (to Intervene)
Apr. 4	Filing Complaint in Intervention
Apr. 12	Filing & Entering Order (Baker & Hurt to Intervene)
Apr. 20	Filing Answer of Tony Salopak
May 5	Filing Answer to Complaint in Intervention
May 17	Filing Stipulation
May 17	Filing Motion
May 17	Filing Notice
Jun. 10	Filing Motion to Intervene & certif. of mailing
Jun. 10	Filing & Entering Order (allowing appearance of Public Lands to file pleading)
Jun. 10	Filing Answer of Intervening Comm. of Public Lands
Jul. 22	Filing Motion to Intervene (Southern Pacific Co.)
Jul. 22	Filing Answer of Southern Pacific Co. to Complaint & Crossclaim
Jul. 22	Filing Notice (Hearing)

DATE	PROCEEDINGS
1966	
Jul. 22	Filing Answer of Southern Pac. Co. to Complaint of Interv. of Pltf. Intervenor Baker & Hurt
Jul. 22	Filing Certificate of Service
Aug. 1	Filing Amended Crossclaim (Southern Pacific Co.)
Aug. 2	Filing & Entering Order (allowing Southern Pac. Co. to enter appearance & pleading)
Aug. 3	Issuing Subpoenas & copies to: Oscar Goldsmith & Gilbert Williams
Aug. 9	Filing Subpoenas & Sheriff's Return (Williams)
Aug. 9	Filing Subpoenas & Sheriff's Return (Goldsmith)
Aug. 10	Issuing Subpoenas Duces Tecum (L. T. Putnam)
Aug. 15	Filing Reply to Amended Crossclaim of Intervenor Southern Pacific Co., by Hurt & Baker
Aug. 16	Issuing Subpoena & copy (Thurmond Yates)
Aug. 29	Issuing Subpoena & copy (Bartley McDonald & Bob Jones, SCS Office)
Aug. 29	Filing Subpoena Duces Tecum & Sheriff's Return
Aug. 30	Issuing Subpoena & Copy (W.P. Stevens)
Aug. 30	Filing Subpoena & Sheriff's Return (Yates)
Aug. 30	Filing Subpoena Duces Tecum & Sheriff's Return
Sep. 20	Filing Transcript of Proceedings
Oct. 11	Filing Amended Answer of Intervening Commissioner of Public Lands of the St. of New Mexico
Oct. 25	Filing & Entering Stipulation
Oct. 26	Filing Notice of Taking Deposition on Written Interrogatories
Dec. 5	Filing Written Interrogatories

DATE	PROCEEDINGS
1967	
Jan. 24	Filing & Entering Order (St. Engineer make hydrographic survey)
Feb. 27	Filing & Entering Order (Court reserves jurisdiction on above Order)
1970	
Jul. 31	Filing Motion for Leave to Intervene
Jul. 31	Filing & Entering Order (allowing St. Engineer to Intervene)
Jul. 31	Filing Complaint in Intervention
Jul. 31	Filing Maps
Jul. 31	Filing Mimbres River Hydrographic Survey Report Volume I
Aug. 17	Filing Motion (for setting aside Order of Intervention)
Aug. 17	Filing Notice (hearing Aug. 25, 1970 at 10 AM)
Sep. 3	Filing Certificate of Service (Motion to Intervene, to Attys of Record)
Sep. 3	Filing Notice to Take Deposition (of Jack Upton)
Sep. 8	Filing Notice of Lis Pendens & Exhibits "A" & "B"
Sep. 15	Filing & Entering Order (Motion to set aside Order of Intervention—Denied)
Sep. 15	Filing & Entering Order Substituting Parties
Dec. 4	Filing Motion (for Special Master & Referee)
Dec. 18	Issuing Summons & copies to U.S.A. for Plaintiff in Intervention
Dec. 18	Issuing Summons (for 900 Defendants) for Plaintiff in Intervention

DATE	PROCEEDINGS
1970	
Dec. 18	Filing & Entering Order of Reference (Irvin S. Moise, Sp. Master & Referee)
1971	
Jan. 15	Filing First Motion to Join Additional Parties Defendant
Jan. 15	Filing First Motion to Correct Defendants' Names
Jan. 26	Filing & Entering First Order to Join Additional Parties Defendant
Jan. 26	Filing & Entering First Order to Correct Defendants' Names
Feb. 9	Filing Second Motion to Join Additional Parties Defendant
Feb. 9	Filing & Entering Second Order to Join Additional Parties Defendant (Town of Silver City & Village of Bayard)
Mar. 2	Filing Affidavit of Service (Mr. Victor Ortega, U.S. Atty & Hon. John N. Mitchell, Atty Gen.)
May 25	Filing Answer of Tony Salopak (Sub-File Nos 712 & 713) & Ex. "A"
May 25	Filing Answer of Henry Schlothauer to Complaint in Intervention
Jun. 14	Filing Third Motion to Join Additional Parties Defendant
Jun. 15	Filing & Entering Third Order Joining Additional Parties Defendant
Jun. 15	Filing Second Motion to Correct Defendants' Names
Jun. 15	Filing & Entering Second Order to Correct Defendants' Names

DATE	PROCEEDINGS
1971	
Jul. 20	Filing Third Motion to Correct Defendants' Names
Jul. 20	Filing Fourth Motion to Join Additional Parties Defendant
Jul. 22	Filing Fifth Motion to Join Additional Parties Defendant
Jul. 27	Filing & Entering Third Order Correcting Defendants' Names
Jul. 27	Filing & Entering Fourth Order Joining Additional Parties Defendant
Jul. 27	Filing & Entering Fifth Order Joining Additional Party Defendant
Aug. 2	Filing Answer to Complaint in Intervention by U.S. of America
Aug. 4	Filing Notice of Hearing (9/16/71 9 AM Sp. Master, Irwin S. Moise, apptd.)
Aug. 4	Filing Certificate of mailing
Aug. 10	Filing Fourth Motion to Correct Defendants' Names
Aug. 10	Filing & Entering Fourth Order Correcting Defendants' Names
Sep. 7	Filing Certificate of Mailing (of Answer of U. S. to Comp. in Intervention)
Oct. 29	Filing Sixth Motion to Join Additional Parties Defendant
Oct. 29	Filing Fifth Motion to Correct Defendants' Names
Nov. 2	Filing & Entering Sixth Order Joining Additional Parties Defendant
Nov. 2	Filing & Entering Fifth Order Correcting Defendants' Names

DATE	PROCEEDINGS
1971	
Dec. 1	Filing Seventh Motion to Join Additional Parties Defendant
Dec. 1	Filing Sixth Motion to Correct Defendants' Names
Dec. 7	Filing & Entering Seventh Order Joining Additional Parties Defendant
Dec. 6	Filing & Entering Sixth Order Correcting Defendants' Names
1972	
Feb. 4	Filing Interrogatories by Def. Henry Schlothauer
Feb. 9	Filing Oral Depositions of Ledru Hyatt & Edward W. Nunn, Sr.
Feb. 15	Filing Motion for Protective Order
Oct. 12	Filing Appearance (State Engineer)
Oct. 25	Filing & Entering Pre-Trial Order
Nov. 30	Filing Brief for Plaintiff-In-Intervention (by Richard Simms, Sp. Asst' Atty Gen, St. Engineer, Santa Fe)
Dec. 18	Filing Pre-Trial Memorandum (of the U.S.)
Dec. 29	Filing copy of letter of Richard A. Simms, Spec. Asst. Atty Gen, requesting extension of time to Jan. 5 to file brief
1973	
Jan. 10	Filing Response to Pre-Trial brief for Plaintiff-In-Intervention
Jan. 10	Filing Certificate of mailing
Oct. 8	Filing Praecipe
Oct. 8	Issuing Subpoenas & copies to Regis McSherry, Adan Baca & Tom Anderson, Dist. Cons.

DATE	PROCEEDINGS
1973	
Oct. 9	Filing Subpoenas & Sheriff's Return (Adan Baca)
Oct. 15	Filing Subpoenas & Sheriff's Return (Regis McSherry)
Oct. 15	Filing Subpoenas & Sheriff's Return (Tom Anderson)
Dec. 17	Filing Fees & Costs of Special Master, copy of charges attached
Dec. 17	Filing & Entering Order (costs to be paid by State Engineer & U.S. of A.)
1974	
Sep. 26	Filing 11 Affidavits of Service (May 22, 1971 thru Aug. 28, 1971)
1975	
Jan. 13	Filing Objections to Proposed Findings of Fact & Etc. of the State of N.M.
Jan. 13	Filing Certificate of Mailing
Apr. 2	Filing Objections to Prop. Findings of Fact, etc., by U.S. & cc of Certif. of mailing
May 5	Filing & Entering Findings of Fact & Conclusions of Law (as to water rights of U.S.)
May 15	Filing Objections to Master's Report
Sep. 3	Filing Letter of Spec. Assistant Atty Gen. to Atty Redd in Washington, D.C. (hearing on Feb. 2, 1976 10 AM)
1976	
May 10	Filing Mimbres River Hydrographic Survey Report Vol II—Sub-Section I

DATE	PROCEEDINGS
1976	
May 10	Filing Key Map of Mimbres River Hydrographic Survey, Township, Tiers 22 & 23 South
May 10	Issuing Summons & copies & returning to St. Engineer's Office, & filing
May 21	Filing Seventh Motion to Correct Defendants' names
May 21	Filing & Entering Seventh Order Correcting Defendants' Names
May 21	Filing Eighth Motion to Join Additional Parties Defendant
May 21	Filing & Entering Eighth Order Joining Additional Parties Defendant
June 4	Filing Objections to Proposed Order Submitted by State Engineer Sustaining Objections, etc.
June 4	Filing & Entering Order Sustaining Objections & Modifying Findings of Fact & Conclusions of Law
June 14	Filing Ninth Motion to Join Additional Parties Defendant
June 14	Filing Exhibits (U.S. & St. of N.M.—Forest Service—Recv'd of Judge Norman Hodges)
June 14	Filing & Entering Ninth Order Joining Additional Parties Defendant
July 2	Filing Notice of Appeal (Filed by Dept. of Agriculture Forest Service, USA)
July 2	Filing Notice of Taking Appeal
July 2	Filing Praecipe (for Complete Record)

IN THE DISTRICT COURT OF THE
SIXTH JUDICIAL DISTRICT OF THE
STATE OF NEW MEXICO,
WITHIN AND FOR THE COUNTY OF LUNA

No. 6326

MIMBRES VALLEY IRRIGATION CO.,
a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, dba Salopak Farms,
and HENERY SCHLOUTHAUER, DEFENDANTS

LEE BAKER and J. W. HURT, Individually, INTERVENORS

GUYTON B. HAYS, Commissioner of Public Lands of the
State Of New Mexico, INTERVENOR

SOUTHERN PACIFIC COMPANY, INTERVENOR

[Filed Jan. 24, 1967]

ORDER

This matter coming before the Court for trial without a Jury and having been tried on March 29th & 30th, 1966, and on October 11th through 13th, 1966, and the Court having considered the evidence and being of the opinion that a decision cannot be made in this matter without a hydrographic survey being made as to the surface water rights of the Mimbres River stream system located in the Counties of Grant and Luna within the State of New Mexico.

NOW, THEREFORE BE IT ORDERED that the State Engineer of the State of New Mexico be, and he is hereby directed, pursuant to the provision of Section 74-4-6 N.M.S.A. Comp. (Supp.) to forthwith make and furnish to this Court a Complete hydrographic survey of the sur-

face waters of the Mimbres River within the Counties of Grant and Luna in New Mexico, and that such hydrographic survey be commenced forthwith and completed as soon as same may conveniently be done.

Dated the 24th day of January, 1967.

/s/ Norman Hodges
District Judge

IN THE DISTRICT COURT OF THE
SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA

MIMBRES VALLEY IRRIGATION CO.,
a non-profit corporation, PLAINTIFF

—vs.—

TONY SALOPAK, dba Salopak Farms,
and HENRY SCHLOUTHER, et al., DEFENDANTS

STATE OF NEW MEXICO, ex rel.
S. E. Reynolds, State Engineer,
PETITIONER FOR INTERVENTION

[Filed July 31, 1970]

MOTION FOR LEAVE TO INTERVENE

COMES NOW the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, and respectfully moves this Court to issue its Order allowing the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, to intervene in the above-styled and captioned cause as a Plaintiff-in-Intervention, and as its grounds therefor states:

1. The above-styled and captioned cause seeks a determination of the relative rights of the parties thereto in public waters of the Mimbres River Stream System;
2. This Court has ordered, and the State Engineer has completed and filed in this cause, a hydrographic survey of the Mimbres River Stream System;
3. Section 75-4-6, N.M.S.A. 1953 Comp., requires that in all suits involving the determination of rights to public waters in any stream system, all known and unknown claimants of interest therein should be joined, a hydrographic survey performed, and provides for the intervention by the State of New Mexico to accomplish a comprehensive and orderly adjudication of all such claims.

WHEREFORE, Movant requests leave to intervene on the Complaint-in-Intervention attached hereto and submitted herewith.

Respectfully submitted,

PAUL L. BLOOM
 PETER THOMAS WHITE
 Special Assistant Attorneys General
 State Engineer Office
 State Capitol
 Santa Fe, New Mexico 87501
 ATTORNEYS FOR NEW MEXICO STATE
 ENGINEER

By /s/ Paul L. Bloom

IN THE DISTRICT COURT OF THE
 SIXTH JUDICIAL DISTRICT
 IN AND FOR THE COUNTY OF LUNA

MIMBRES VALLEY IRRIGATION Co.,
 a non-profit corporation, PLAINTIFF

vs.

TONY SALOPAK, dba Salopak Farms,
 and HENRY SCHLOUTHER, et al., DEFENDANTS

STATE OF NEW MEXICO, ex rel.
 S. E. Reynolds, State Engineer,
 PETITIONER FOR INTERVENTION

[Filed July 31, 1970]

ORDER

THIS MATTER coming on to be heard upon the Motion of the State of New Mexico for leave to intervene and the Court having considered the Motion and being otherwise advised in the premises finds that it should be and it is hereby granted.

/s/ Norman Hodges
 District Judge

IN THE DISTRICT COURT OF THE
SIXTH JUDICIAL DISTRICT IN AND FOR THE
COUNTY OF LUNA, STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO.,
a non-profit corporation, PLAINTIFF

v.

TONY SALOPEK, dba Salopek Farms,
and HENRY SCHLOUTHAUER, DEFENDANTS

LEE BAKER and J. W. HURT, individually, INTERVENORS
GUYTON B. HAYS, Commissioner of Public Lands of the
State of New Mexico, INTERVENOR

SOUTHERN PACIFIC COMPANY, INTERVENOR

STATE OF NEW MEXICO, ex rel.
S. E. Reynolds, State Engineer,
PLAINTIFF-IN-INTERVENTION

v.

ESTATE OF DAVID ABRAHAM * * * [approximately 244
defendants-in-intervention omitted] * * * FORT BAYARD
MILITARY RESERVATION * * * [approximately 658 de-
fendants-in-intervention omitted] * * * UNITED STATES
OF AMERICA * * * [approximately 98 defendants-in-
intervention omitted] * * * ALL UNKNOWN HEIRS OF
ANY PERSON NAMED ABOVE, AND ALL CLAIMANTS OF
INTEREST TO WATER IN THE MIMBRES RIVER STREAM
SYSTEM, DEFENDANTS-IN-INTERVENTION

[Filed July 31, 1970]

COMPLAINT-IN-INTERVENTION

COMES NOW State of New Mexico, on the relation of
S. E. Reynolds, State Engineer, Plaintiff-Intervenor, by
and through its attorneys, and states:

I.

S. E. Reynolds is the duly appointed, and qualified, State
Engineer of the State of New Mexico, charged by law
with the supervision of the apportionment of public waters
of the State according to the licenses issued by him and
his predecessors and the adjudications of the Courts.

II.

This action arises under Sections 75-4-2, 75-4-4, 75-4-6,
75-4-7, 75-1-8, New Mexico Statutes Annotated, 1953
Compilation.

III.

The Mimbres River, its surface-water tributaries, and the
underground waters tributary and related thereto, in-
cluding all public waters within the Mimbres Under-
ground Water Basin, constitute a stream system of the
State of New Mexico.

IV.

The surface and underground waters of the Mimbres
River Stream System are public waters of the State of
New Mexico, subject to appropriation for beneficial use
as provided by law.

V.

S. E. Reynolds, State Engineer, has caused to be under-
taken a hydrographic survey of the Mimbres River Stream
System, and a report of a portion of this survey has been
filed with the Court; a remaining portion of the report
will be filed with the Court upon completion.

VI.

The Plaintiff-Intervenor is informed and believes, and
therefore avers, that the Defendants, and each of them
named in this Complaint, claim rights to take and use

the waters of the Mimbres River Stream System, and base their claims upon the Constitution and laws of the State of New Mexico.

VII.

The claims of the Defendants, and each of them, to the waters of the Mimbres River Stream System, as against each other and as against the State of New Mexico, have never been fully determined and decreed by the Courts.

VIII.

Unless this Court determine and decree the rights of the Defendants, and each of them, to the waters of the Mimbres River Stream System, as against each other and as against the State of New Mexico, the administration and supervision of the waters of the Mimbres River Stream System required by law will be impossible.

WHEREFORE, Plaintiff-Intervenor respectfully prays:

1. That this honorable Court appoint its master to take evidence and make his report on all questions of fact and law, which report shall determine all general and specific issues of fact properly arising in this action, and to make such findings of fact and conclusions of law as may appear to him necessary and proper;

2. That the Defendants, and each of them, be required to appear before the Court and describe fully and in detail what rights, if any, they claim to the use of the water in the said Mimbres River Stream System, and more specifically to state:

- a. When said water right was initiated;
- b. If a water right for irrigation is claimed, the lands to which it is appurtenant;
- c. Source of water;
- d. Purpose for which it is used;
- e. The amount of water necessary for the beneficial use for which it was appropriated;

f. Such other matters as may be necessary to define a particular right and its priority;

3. That the Court determine and define the water rights of each of the several defendants, as against the State of New Mexico and *inter sense*, and enter its decree stating:

- a. The water rights adjudged each party;
- b. The source, priority, amount, purpose, periods, and place of use of each right;
- c. The specific tracts of land to which the water right for irrigation is appurtenant;
- d. Such other matters as may be necessary to define a particular right and its priority;

4. That the Court enter its Order enjoining all illegal use of surface and underground waters of the Mimbres River Stream System, and where necessary require measuring devices at points of diversion in this stream system;

5. That the Court name additional parties from time to time as it appears necessary for the determination and adjudication of all the water rights of the Mimbres River Stream System;

6. That the Court enter such preliminary, interlocutory, and final orders as are necessary to a final determination and adjudication of all water rights of the Mimbres River Stream System.

PAUL L. BLOOM
PETER THOMAS WHITE
Special Assistant Attorneys General
State Engineer Office, State Capitol
Santa Fe, New Mexico 87501

ATTORNEYS FOR NEW MEXICO STATE
ENGINEER

By /s/ Paul C. Bloom

[Filed in State District Court Sept. 8, 1970]

NOTICE OF LIS PENDENS

NOTICE IS HEREBY GIVEN that there is now pending in the District Court of the Sixth Judicial District of New Mexico the above-styled and numbered cause. The parties defendant are listed in Exhibit "A" attached hereto, and made a part hereof. This suit affects or concerns the title to water rights located in Grant and Luna Counties, and the defendants claim a right to the waters of the Mimbres River Stream System, as more particularly described in Exhibit "B", attached hereto and made a part hereof, and further affects or concerns water rights for municipal, domestic, industrial, or manufacturing uses where the point of diversion or use is within the boundaries of the Mimbres River Stream System.

The object of this suit is to adjudicate all the uses of surface and groundwaters of the Mimbres River Stream System and to enjoin all illegal use of said waters.

/s/ Peter Thomas White
 PETER THOMAS WHITE
 Special Assistant Attorney General
 State Engineer Office, State Capitol
 Santa Fe, New Mexico 87501

ATTORNEY FOR S. E. REYNOLDS,
 NEW MEXICO STATE ENGINEER

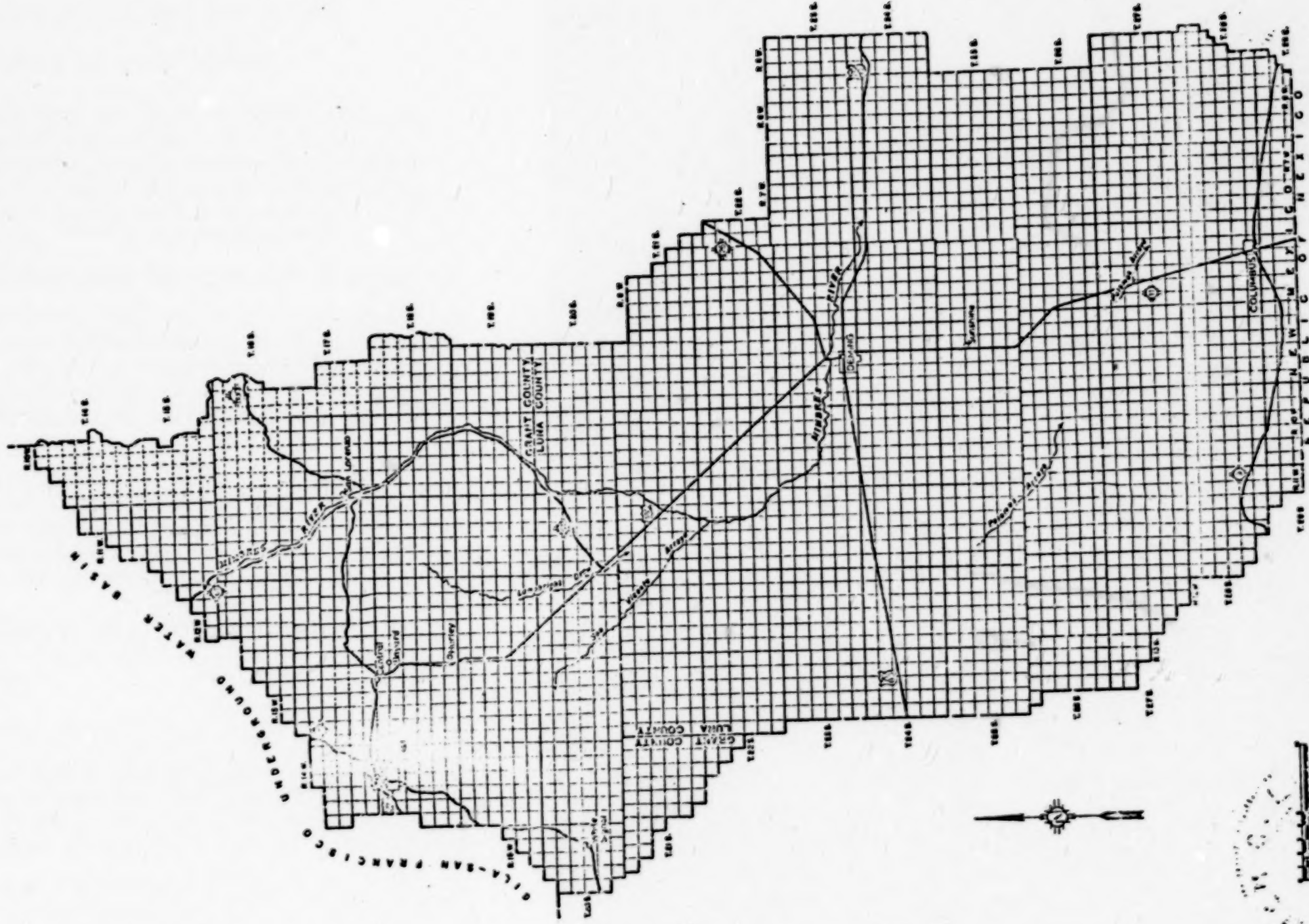
EXHIBIT A

Name	Sub-File	Page
Fort Bayard Military Reservation	233	254
U.S.A., Dept. of Agriculture, Forest Service	818	412
U.S.A., Federal Aviation Agency	819	414

MINNESOTA, ILLINOIS UNDERGROUND WATER BASIN

N. MEX. STATE ENGINEER

1970



Chg. 2 March 4, 1960

EXHIBIT "B"

[Filed in State District Court Dec. 18, 1970]

ORDER OF REFERENCE

THIS MATTER came on to be considered upon the motion of the plaintiff, State of New Mexico ex rel. S. E. Reynolds, State Engineer, praying that the Court appoint Irwin S. Moise as the Special Master and Referee in this cause, and the Court having considered said motion and being otherwise fully advised in the premises finds:

1. That this cause involves more than 900 defendants;
2. That the plaintiff-in-intervention has reason to believe from previous experience in the adjudication of water rights that a substantial number of defendants will contest the Offers of Judgment made to them and as to each such defendant a hearing may be required.
3. That the appointment of Irwin S. Moise as the Special Master in this cause will permit considerable economies in the time of this Court and will provide a more speedy and inexpensive determination of particular questions of fact and law.

IT IS THEREFORE ORDERED that Irwin S. Moise should be and he is hereby appointed Special Master and Referee in this cause.

IT IS FURTHER ORDERED:

2. That the said Special Master shall make inspections, take testimony and hold hearings at whatsoever times and places he may deem appropriate on all contested issues of law or fact in this cause;
2. That he shall make report to the Court at the conclusion of every hearing or investigation in which he presides, and each report shall, where appropriate, contain his Findings of Fact and Conclusions of Law;

3. That he shall be compensated at the rate of \$100.00 per day or \$12.50 per hour, plus reimbursement for his reasonable and necessary expenses, which expenses shall include travel, lodging, and the employment of court reporters and interpreters when required. The Master shall periodically certify his fees and costs to the Court, which costs, upon approval of the Court, shall be assessed against the District Court fund;
4. That any party to a proceeding before the Special Master may appeal from an adverse decision of the Master to the Court by filing within ten days after the filing of the Special Master Report to which he objects a motion for a trial setting in that matter.

DATED this 17th day of December, 1970.

/s/ Norman Hodges
HON. NORMAN HODGES
District Judge

[Filed in State District Court Mar. 2, 1971]

AFFIDAVIT OF SERVICE

I hereby certify that on February 9, 1971 I mailed by certified mail return receipt requested copies of the State of New Mexico ex rel. S. E. Reynolds, State Engineer's, Summons and Complaint-in-Intervention to Mr. Victor Ortega, U.S. Attorney for the District of New Mexico and to the Honorable John N. Mitchell, Attorney General for the United States of America. Evidence of receipt of the said Summons and Complaint-in-Intervention is made with attached copies of receipt for certified mail and signed return receipt card.

/s/ Peter Thomas White
PETER THOMAS WHITE
Special Assistant Attorney General
State Engineer Office, State Capitol
Santa Fe, New Mexico 87501

ATTORNEY FOR S. E. REYNOLDS
NEW MEXICO STATE ENGINEER

Subscribed and sworn to before me this 1st day of March, 1971.

[SEAL]

/s/ [Illegible]
Notary Public

My Commission Expires: October 1, 1973

[Filed in State District Court Aug. 2, 1971]

ANSWER TO COMPLAINT IN INTERVENTION

The United States of America by its duly authorized attorneys in answer to the State of New Mexico's Complaint in Intervention alleges as follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Denies the allegations of paragraph IV with respect to waters in and on lands within the State owned by the United States.

V.

With respect to the allegations of paragraph V the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

VI.

With respect to the allegations of paragraph VI the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

VII.

Admits the allegations of paragraph VII.

VIII.

With respect to the allegations of paragraph VIII the defendant lacks sufficient knowledge upon which to base an affirmation or denial.

IX.

Alleges that it owns lands within the watershed of the Rio Mimbres which are part of the Gila National Forest. Those national forest lands in the Rio Mimbres Watershed located in Sections 23, 26, 27, 28, 32, 33, 34 and 35, T. 13S., R.10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T.14S., R.10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T.14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T.15S., R.10W., N.M.P.M.; all Sections in T.15S., R.11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T.15S., R.12W., N.M.P.M. were reserved for national forest use by presidential proclamation dated March 2, 1899. Those national forest lands in the Rio Mimbres Watershed located in Section 31, T.15S., R.9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T.16S., R.9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T.16S., R.10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T.16S., R.11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T.16S., R.12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T.16S., R.13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T.17S., R.9W., N.M.P.M.; Section 1, T.17S., R.10W., N.M.P.M.; Sections 6, 7 and 18, T.17S., R.11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18 and 19, T.17S., R.12W., N.M.P.M.; Sections 1, 2, 3, 4, 9,

10, 11 and 12, T.17S., R.13W., N.M.P.M.; and Sections 3, 4 and 5, T.17S., R.14W., N.M.P.M. were reserved for national forest use by presidential proclamation dated July 21, 1905. Those national forest lands in the Rio Mimbres Watershed located in Sections 32 and 33, T.19S., R.15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T.20S., R.15W., N.M.P.M. were reserved for national forest use by presidential proclamation dated February 6, 1907. Those national forest lands in the Rio Mimbres Watershed located in Sections 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T.16S., R.10W., N.M.P.M.; Sections 10, 11, 13 and 24, T.16S., R.11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T.17S., R.10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29 and 30, T.17S., R.14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T.17S., R.15W., N.M.P.M. were reserved for national forest use by presidential proclamation dated June 18, 1908. Those national forest lands in the Rio Mimbres Watershed located in Sections 5, 6, 7, 8 and 9, T.16S., R.11W., N.M.P.M.; Sections 5, 8 and 17, T.17S., R.11W., N.M.P.M.; Sections 19, 30, 31, and 32, T.17S., R.9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T.18S., R.9W., N.M.P.M. were reserved for national forest use by presidential proclamation dated May 9, 1910.

X.

When these lands were reserved for national forest use, the unappropriated waters in and on such lands were withdrawn from private appropriation as against the United States and were reserved for use on such land by the United States to the extent necessary for the requirements and purposes of said reservation.

XI.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on lands of the national forest above described as is or may become necessary for the require-

ments and purposes of said national forest reserves having priority dates of the dates the lands were withdrawn for national forest use.

XII.

The United States owns lands within the Rio Mimbres Watershed known as the Ft. Bayard Military Reservation. This reservation was established by the United States Army on August 21, 1866. By Executive Order dated April 16, 1869, the reservation of the Ft. Bayard Military Reservation was confirmed. By Executive Order dated July 14, 1906, the legal description of Ft. Bayard Military Reservation was modified to make the boundaries conform to those shown on the plats of the General Land Office. By this Order the boundaries were delineated as follows:

Beginning at a point on the east line of R.13W., New Mexico Meridian, seven chains north of the south line of T.17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest 1-4 of Section 10; thence east to the west line of northeast 1-4 of southwest 1-4 of Section 10; thence south to the southwest corner of same; thence east along the south line of same and along south line of northwest 1-4 of southeast 1-4 of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast 1-4 of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R.13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

XIII.

By Executive Order dated May 23, 1907, Sections 35 and 36, T.16S., R.13W. and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$, Section 1; the N $\frac{1}{2}$ of the NW $\frac{1}{4}$, Section 2; the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 11; and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$, Section 12, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawal of these lands as part of the Gila National Forest for forest purposes.

XIV.

By Executive Order dated July 23, 1908, the W $\frac{1}{2}$ of the SW $\frac{1}{4}$, Section 1; the E $\frac{1}{2}$ of the SE $\frac{1}{4}$, Section 2; the N $\frac{1}{2}$ of the NE $\frac{1}{4}$, the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$, and the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 3; the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and Lot 4 of Section 10; all in T.17S., R.13W., N.M.P.M. and Lots 4, 5, 6 and 7, Section 6, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawal of these lands as part of the Gila National Forest for forest purposes.

XV.

By Executive Order dated November 13, 1908, the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 7, and the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$, Section 18, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

XVI.

By Executive Order dated June 22, 1910, the E $\frac{1}{2}$ of NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the NE $\frac{1}{4}$, Section 7, T.17S., R.

12W.; the E $\frac{1}{2}$ of the NW $\frac{1}{4}$, the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$, Section 1, T.17S., R.13W.; the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and Lot 1, Section 11 and Lots 3 and 4, Section 12, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

XVII.

By Executive Order dated October 22, 1910, the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 18, T.17S., R.12W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

XVIII.

By Executive Order dated April 24, 1911, the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 10 and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 3, T.17S., R.13W., N.M.P.M. within the limits of the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard without revoking or cancelling the withdrawals of these lands as part of the Gila National Forest for forest purposes.

XIX.

Ft. Bayard was used for many years as an active military post and then as an Army hospital. In 1912, the administration of the hospital was transferred to the Public Health Service. On May 1, 1922, the administration of Ft. Bayard was transferred to the Veterans Administration. On January 2, 1941, all of the lands of Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section

35, and the NW $\frac{1}{4}$ of Section 36, all in T.17S., R.13W., N.M.P.M., were transferred to the Department of Agriculture to be administered as forest lands. The lands not transferred to the Department of Agriculture were administered by the Veterans Administration, as a hospital and a cemetery.

XX.

On July 1, 1966, the following described property, together with the appurtenant water rights was conveyed to the State of New Mexico to be operated as a hospital:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T.17S., R.13W., N.M.P.M., Grant County, New Mexico, described as follows:

Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.57°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1698.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence N.1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

Excluding therefrom however;

All that part known as the Fort Bayard Veterans Administration Cemetery, and described as follows:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

Total Net Acreage being: 467.991 acres, more or less.

XXI.

Of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36 in T.17S., R.13W., N.M.P.M. not conveyed to the State of New Mexico for operation as a hospital, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N.75°30'W., 949.62 dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

A right to water for the cemetery needs from the existing water supply system on the hospital property was reserved in the deed of conveyance to the State of New Mexico.

XXII.

The balance of the above described portions of Sections 25, 26 35 and 36, T.17S., R.13W., N.M.P.M., not conveyed to the State of New Mexico or retained for

use as a military cemetery was transferred to the administration of the Department of Agriculture for a forest service administration site.

XXIII.

When the lands comprising Ft. Bayard Military Reservation were withdrawn for military use the unappropriated waters in and on such lands were withdrawn from private appropriation as against the United States and were reserved for use on such lands to the extent necessary for the requirements and purpose of said reservation. When the lands within the Gila National Forest were further withdrawn from sale or other disposition to protect the water supply of Ft. Bayard the unappropriated waters in and on such lands were further withdrawn from private appropriation as against the United States and were reserved for use on the Ft. Bayard Military Reservation by the United States to the extent necessary for the requirements and purposes of the military reservation. When the administration of the Ft. Bayard Military Reservation was transferred to the Department of Agriculture for forest purposes this constituted a valid change of use of the reserved water rights.

XXIV.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on the Ft. Bayard Military Reservation as is or may become necessary for the requirements and purposes of the national forest so long as these needs do not exceed the uses that would have been made of the waters in and on these lands for military purposes, had Ft. Bayard remained an active military post, with a priority date of August 21, 1866.

XXV.

The United States claims rights in and to the use of so much of the waters of the Rio Mimbres and its tributaries in and on Ft. Bayard and in and on those

portions of the Gila National Forest further withdrawn from sale or other disposition for the protection of the water supply of Ft. Bayard as is or may become necessary for the use of the military cemetery on those lands with priority dates as of the dates the lands were withdrawn for the military reservation and for water supply protection of the said reservation.

WHEREFORE, the United States prays

(1) That each and all of the defendants owning lands or claiming water rights within the watershed of the Rio Mimbres be required to appear before the court and set forth fully any claims in and to the use of the waters of this stream and its tributaries.

(2) That the court determine the rights of each of the parties in and to the use of the waters of the Rio Mimbres and its tributaries and enter its decree setting forth such rights with a date of priority for each right.

(3) That the court determine and decree that the United States has the rights to divert and use so much of the water of the Rio Mimbres and its tributaries as is in and on the National Forest lands within the Rio Mimbres watershed as is or may become necessary for the needs and purposes of such National Forest lands and that such rights be declared to have priority dates for the respective lands as of the dates they were reserved for National Forest uses.

(4) That the court determine and decree that the United States has the rights to divert and use so much of the water of the Rio Mimbres and its tributaries in and on that portion of the Fort Bayard Military Reservation being administered by the Department of Agriculture for forest purposes as is or may become necessary for the needs and purposes of those lands as forest lands so long as these needs do not exceed the uses that would have been made of the waters in and on these lands for military purposes, had Fort Bayard remained an active military post and that such rights be declared to have a priority date of August 21, 1866.

(5) That the court determine and decree that the United States has the rights to divert and use so much of the waters of the Rio Mimbres in and on Fort Bayard and in and on those portions of the Gila National Forest further withdrawn from sale or other disposition for the protection of the water supply of Fort Bayard as is or may become necessary for the use of the military cemetery on those lands and that such rights be declared to have priority dates as of the dates the lands were withdrawn for the military reservation and/or for water supply protection of Fort Bayard.

(6) That the court enter its order enjoining all diversions and uses of water from the Rio Mimbres and its tributaries except in accordance with the rights and priorities as set forth in the Court's decree.

(7) That the court appoint a water master to administer the waters of the Rio Mimbres and the respective rights of all users therefrom in accordance with the orders and directives of this court.

(8) That the court enter such further orders and decrees as may be just and proper for an adjudication of the parties rights to the use of the waters of the Rio Mimbres and its tributaries.

VICTOR R. ORTEGA
United States Attorney

By: /s/ Mark B. Thompson III
MARK B. THOMPSON III
Assistant United States Attorney

/s/ Donald W. Redd
DONALD W. REDD
Attorney, Department of Justice
Attorneys for Plaintiff in
Intervention

[Filed in State District Court Aug. 4, 1971]

NOTICE OF HEARING

TO: ALL COUNSEL OF RECORD

Please take notice that the Honorable Irwin S. Moise, the Special Master heretofore appointed by the Court in this matter, has set a pre-trial conference for September 16, 1971, at 9:00 a.m., at the Luna County District Courthouse, Deming, New Mexico.

Some of the matters to be taken up at the pre-trial conference are the following:

1. Discussion of procedures for the litigation of matters by the Special Master.
2. The determination of which Sub-Files have contested issues of fact or law.
3. The setting down for hearing of the contested Sub-Files that are ready for trial.
4. The clarification of the claims of the United States of America for the Gila National Forest and the Fort Bayard Military Reservation.
5. Discussion of the nature and extent of flood water rights.

/s/ Peter Thomas White
PAUL L. BLOOM
PETER THOMAS WHITE
Agency Assistant Attorneys General
State Engineer Office
Bataan Memorial Building
Santa Fe, New Mexico 87501
ATTORNEYS FOR PLAINTIFF-IN-INTERVENTION
STATE OF NEW MEXICO EX REL. S. E. REYNOLDS

[Filed in State District Court Oct. 25, 1972]

PRE-TRIAL ORDER

At a pre-trial conference held at the Court House in Silver City, New Mexico, on September 26, 1972, pursuant to Notice, the following transpired:

* * *

(6) Concerning the various claims of water by the United States, the State Engineer agrees that the United States has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved. However, the following legal questions are to be resolved by the Court:

(a) In the adjudication of a reserved water right of the United States must a specific quantity limitation be decreed by the Court?

(b) Does the United States have a right to change the use of waters previously reserved for the Ft. Bayard Reservation (military use) to uses incident to national forests on the remaining 11 sections of land being administered by the Forest Service?

(c) Was recreation use within uses for which water could be reserved prior to the Federal Multiple Use Act?

(d) Were the limits as to uses for which water could be reserved or withdrawn in national forests fixed as of the time that the national forest was created?

(e) If recreation uses were not within the original purposes of forest use, did reservation for this purpose arise as to forests previously created with the enactment of the Multiple Use Act?

(7) The United States and the State Engineer will submit simultaneous Briefs on the questions set forth

in (6) above, on or before December 1, 1972, and will respond to the Briefs of the other on or before January 1, 1973.

(8) The State asserts a question of fact to be present as to whether or not any unappropriated waters were available for reservation at the time of reservation or withdrawal by the United States for forest or other purposes. This question will have to be tried if no agreement as to the facts can be reached.

(9) A trial date on unresolved issues, both of law and fact, will be tentatively set for April 2, 1973, at the Court House at Deming, New Mexico. This is a date which we will try to meet, subject to unavoidable delays. Further notice will be given.

/s/ Irwin S. Moise
IRWIN S. MOISE
Special Master

[Filed in State District Court Nov. 30, 1972]

BRIEF FOR STATE OF NEW MEXICO

* * * *

POINT VI

RECREATION IS A PURPOSE OF NATIONAL FOREST USE TO THE EXTENT THAT ITS ENJOYMENT PARTAKES OF THE NATURAL CONDITION OF THE FOREST LANDS WHEN WITHDRAWN.

An extremely technical argument could be made in order to establish that recreation was not a valid purpose for the creation of a national forest until the passage of the Multiple Use Sustained Yield Act of June 12, 1960. (74 Stat. 215). We find the argument ill-advised and concede the above stated Point to the extent such recreation is of a magnitude revealed in traditional and historic use.

[Filed in State District Court Dec. 18, 1972]

PRE-TRIAL MEMORANDUM OF UNITED STATES

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C. Recreation Was a Valid Use For Which Water Could Be Reserved On National Forest Lands Prior To The Federal Multiple Use Act.

1. *The Courts have recognized Recreation as Valid Forest Purpose.*

The question of whether the withdrawal of public lands for national forest purposes reserved waters in and on those lands for recreational purposes has already been answered in the affirmative by the Supreme Court of the United States. In the case of *Arizona v. California, supra.*, the Special Master in his report found that the national forests in the lower Colorado River Basin, including the Gila National Forest, were established for the following purposes:

- 1) The protection of watersheds and the maintenance of natural flow of stream below the sheds;
- 2) Production of timber;
- 3) Production of forage for domestic animals;
- 4) Protection and propagation of wildlife;
- 5) Recreation by the general public. Masters Report, p. 96 (1960).

The Master then noted that water is used on these national forests for "recreation, domestic purposes, irrigation and stock watering." (Id.) The report of the Master was adopted and approved by the Court with respect to this finding. As noted above, this finding applies to the same national forest under consideration in this adjudication—the only difference being that it pertained to the lands on the other side of the watershed divide between the Gila and Mimbres Rivers.

The position of the Supreme Court in *Arizona v. California, supra.*, with respect to reserved water rights

was reaffirmed in 1972, in the case of the *United States v. District Court in and for the County of Eagle, et al.*, 401 U.S. 520. In this case, the Court stated:

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a state is admitted into the union "to reserve waters for the use and benefit of federally reserved lands." *Id.* at 597. *The federally reserved lands include any federal enclave.* In *Arizona v. California*, we were primarily concerned with Indian Reservations. *Id.* 598-601. The reservation of waters may be only implied and *their amount will reflect the nature of the federal enclave.* *Id.* 600-601. (Emphasis added.)

2. *A Fair Interpretation of the Basic Statutes Includes Recreation as a Valid Forest Purpose.*

In this adjudication, we are concerned primarily with waters reserved for national forest purposes. The scope of the forest purposes has been questioned by the State of New Mexico in that recreation has been challenged as a valid forest purpose at the time the lands within the Gila National Forest were reserved for forest purposes. A review of the history of our national forests, however, clearly shows that recreation has been a valid purpose of our national forests from the time they were first created.

The Act of March 3, 1891, 26 Stat. 1103, authorized the President of the United States to create national forests by reserving public lands. We have evidence that can be introduced at the trial, if desired, that will establish that even before the forests had been reserved they had long been used for recreational purposes such as camping, hunting, and fishing.

The Organic Act of July 24, 1897, 30 Stat. 35, contains the following language:

No public forest reservation shall be established except to improve and to protect the forest within the

reservation, or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessity of citizens of the United States; but it is not the purpose or intent of these provisions or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for minerals therein or for agricultural purposes than for forest purposes.

It has been suggested by some individuals that the language of this provision limits the valid purposes of the national forests to securing favorable conditions of water flow and to the production of timber. A careful reading of this entire provision as a unit, however, is necessary to grasp the real intent of Congress. It is noted that, under this statute, forests may be established (1) "to improve and protect the forest within the reservation," or (2) "for the purpose of securing favorable conditions of water flow and to furnish a continuous supply of timber." Furthermore, it is apparent from the balance of the paragraph that the real purpose of this provision was to insure that lands more valuable for the minerals therein or for agricultural purposes than for forest purposes were not included within the forest reservations.

The next paragraph of this statute reads as follows:

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their *occupancy and use* and to preserve the forests thereon from destruction.

This mandate for regulations for the occupancy and use of the forests indicates that Congress envisioned uses broader than watershed protection and timber production, namely, multiple use and utilization of all of the resources of the national forests.

3. *The Officials Charged with the Administration of the National Forests have Consistently Construed the Statutes Pertaining to National Forests as Authorizing Recreation as a Valid Forest Purpose.*

The Courts have held that great weight should be given to the interpretation of statutes by those officials charged with the duty of enforcing such statutes. *Udall v. Tallman*, 380 U.S. 1, 1965, *United States v. Southwest Potash Corp.*, 352 F.2d 113 (C.A. 10, 1965), cert. den., 383 U.S. 911; *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939). In the case of *Udall v. Tallman*, *supra*, the Court said:

The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; the Court must, therefore, respect it.

The official records of both the Department of the Interior and the Department of Agriculture show that from the very beginning the statutes with respect to national forests have been construed as including recreation within the valid purpose for which national forests were authorized.

In 1902, the first comprehensive forest regulations were published by the General Land Office under the title of *Forest Reserve Manual*. On page seven of this manual, there was provision for the leasing of lands near mineral springs under the Act of 1899, 30 Stat 908. At page eight of this manual, under the heading "Travel In and Across the Reservation" the following provision appeared:

All law abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims and for *pleasure and recreation*. (Emphasis added.)

In 1905, under the provisions of the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. 472, the responsibility of caring for and administering the forest reserves was transferred to the Department of Agriculture. In a letter dated February 1, 1905, to Gifford Pinchot, the director

of the Forest Service, the Secretary of Agriculture directed that questions of policy in the management of the national forests should be decided from the standpoint of the "greatest good of the greatest number in the long run." This has continued to be the policy of the Department of Agriculture in the administration of our national forests up to the present time. A manual entitled "The Use of the National Forest Reserves" was published by the Department of Agriculture in 1905 to govern the administration of the national forests. Regulation 42 of this manual provided that "hotels, stores, mills, summer residences and similar establishments will be allowed whenever the demand is legitimate and consistent with the best interests of the reservation. (p. 49.) This manual also directed rangers to "inform all hunters and travelers of the local game laws and to endeavor to prevent their violation. (p. 81.) By 1913, the annual report of the Forest Service to Congress showed 1,507,008 people under the heading of pleasure seekers had visited the national forests in that year. This report also contained the following passage:

Recreational use of the Forest is now growing very rapidly, especially on forests of considerable size. Hundreds of canyons and lakeshores are now dotted with camps and cottages built on land, use of which is obtained through permits of the Forest Service. This is an important form of use of the Forest Service by the public, and it is recognized and facilitated by adjusting commercial use of the forests, when necessary, to the situation created by the needs of the recreation seekers. Examples of such adjustments are the exclusion of stock from the locality where they would interfere with such a summer population, or the prohibition of use of certain canyons for drive-ways, and provision in timber sales for very light cutting or not cutting at all, close to lakes and elsewhere where it is desirable to preserve the natural beauty of the location unmarred, for the enjoyment of the public. (p. 41-42.)

The legislative history of the Multiple Use-Sustained Yield Act, 74 Stat. 215, 16 U.S.C. § 528, is quite revealing with respect to the purposes and uses of the national forests prior to enactment of that statute. The Department of Agriculture, in its letter recommending passage of the Act stated:

The national forests have long been administered under the policies of multiple use and sustained yield. The Department does not believe there is any question as to its authority to so manage the national forests, and the recommendation that this draft bill be enacted should not be so construed.

4. Congress Has Consistently Recognized Recreation As a Valid Forest Purpose.

In both the Senate and House Reports on the Multiple Use Act, the following language appears:

On the same day that the administration of the national forests was given to the Secretary of Agriculture by the Act of February 1, 1905, 16 U.S.C. 472, Secretary of Agriculture Wilson directed that questions of policy in their management should be decided from the standpoint of the "greatest good of the greatest number in the long run." Enactment of the bill would continue this policy. The administration of national forests has long been under the policy of the Multiple Use and Sustained Yield. House Report No. 1551, p. 2; Senate Report No. 1407, p. 3, 86th Cong. 2d Sess.

In 1899, Congress enacted two measures which recognized recreation as a valid purpose of the national forests. The Act of February 28, 1899, 30 Stat. 908, authorized the Secretary of the Interior "to rent or lease to responsible persons . . . suitable spaces on the ground near or adjacent to mineral, medicinal, or other springs in any other forest reserves . . . where the public is accustomed or desires to frequent for health or pleasure."

Later that year, Congress amended the forest service appropriation act to provide for protection of the fish and

game resources of the reserves directing its forest agents to aid in the enforcement of laws in relation to the protection of fish and game.

Beginning in 1907, the appropriation bills for the forest service began showing funding "to transport and care for fish and game supplied to stock the national forests or the waters therein." Eg. 34 Stat. 1270. Quite obviously, such appropriations were for recreational uses.

In 1922, Congress made the first specific appropriation "for the construction of sanitary facilities and for fire prevention measures on public camp grounds within the national forests." 45 Stat. 520.

* * *

Respectfully submitted,

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TRANSCRIPT OF HEARING
BEFORE SPECIAL MASTER
ON OCTOBER 9, 1973

[3] THE COURT: All right, sir. Mr. Redd, are you ready to proceed?

MR. REDD: We would like to call Mr. Carlson.

THE COURT: Do you have any other witnesses I can swear at the same time?

MR. REDD: We have Mr. Norman Ritchey.

(WHEREUPON, witness were duly sworn by the Court.)

WESLEY CARLSON

Called as a witness herein, after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. REDD:

Q. Mr. Carlson, would you state your name and present address and present occupation, please?

A. My name is Wesley Carlson. I'm presently employed by the United States Forest Service, Washington, D. C.

Q. And what are your duties in your present assignment, Mr. Carlson?

A. I handle a number of matters. One of these is the review of and help in developing environmental statements in connection with water resource development projects which might involve national forest system lands. Another one of my responsibilities is national administration coordination of water rights activities [4] within the Forest Service.

Q. Now, Mr. Carlson, what is your educational background?

A. I graduated from Colorado State University with a bachelor's degree in forestry in 1943, and I followed that with work on an advanced degree which I did not complete in watershed management.

Q. And at what school was this?

A. This was at Colorado State.

Q. Now, how long have you worked for the Forest Service?

A. I have to think a minute. Twenty-seven years.

Q. Then, essentially all of your working life has been with the Forest Service, is that correct?

A. That's correct.

Q. Could you review for the Court very briefly what your various assignments have been in the Forest Service?

A. I was an Assistant District Ranger and District Forest Ranger at two different districts. I was a Wildlife Staff Watershed Officer on two national forests. I was with the Inter-Mountain Forest Range Mountain Station, which is an arm of the Forest Service in flood control survey activities. I spent two or three years in our Division of Watershed Management in Ogden, Regional Office there. I was a Coordinator for the Inter-Mountain Region. And eight years I spent as Forest Supervisor at Challis National Forest in Idaho. And the last two [5] years, I have been in our Washington office.

Q. How many of these twenty-seven years that you have been in the Forest Service have you had some duties that concerned watershed management and utilization of water?

A. To a greater or lesser degree, practically all that entire time.

Q. Now, in your present assignment in Washington, do you have any responsibility over the inventories of the water rights in the various national forests?

A. Insofar as national priorities are concerned and attempting to allocate funds and also coordination of activities, we're trying to use a similar approach throughout the entire national forest system in completing our inventory.

THE COURT: Similar to what?

THE WITNESS: Well, one region would do it in a similar manner as the next region.

THE COURT: You mean uniform?

THE WITNESS: Uniform, right.

BY MR. REDD:

Q. Now, have some particular problems been run into in the inventory of the water uses with the present/future?

A. Would you repeat that?

Q. Have you run into any problems with respect to present and future needs for water in this inventory?

[6] A. Well, we found that it's very difficult to identify all the uses, and particularly on the first time around, it's like developing any new activities. You find certain things the first time around; when you take a new look at it, you find other things, items that you might have overlooked. Or you might find that in some instances, your—you have identified more than you need or less than you need. We found some of those kind of difficulties.

Q. Now, in running these inventories, have you found that there are some problems in estimating what the needs will be because of the state of development of our measuring methods for some of these needs?

A. Well, I think in most of our instances where we have diverted water, we're able to measure those very concisely. In the case of water needed in the stream for various purposes, we're just now in the process of trying to develop a methodology to measure these, and we're not too far down the road in getting that methodology organized. We have worked with various states, various state agencies, in trying to put together a methodology, as well as with other federal agencies.

Q. Now, Mr. Carlson, you stated that you have some supervisory capacities in coordination of the inventories from the national forests; is this correct?

[7] A. Well, I helped develop national policies to a degree, and then coordinate how that policy is organized and operated at regional levels.

Q. Now, could you tell us very broadly what the criteria are in itemizing an inventory in the various needs of the Forest Service for water for future need?

A. For future needs? Well, we have taken a very broad approach for future needs. Might use recreation as an example. About all we have to rely on is the projection, the trends of use and activities. And we can estimate then, based on the trends that we can identify, we can estimate what the future needs would be; insofar as livestock grazing is concerned, it's tied to the capacity of the land to handle livestock. If there is enough grass to graze livestock, a hundred head of livestock, we can identify reasonably close how much water they would consume.

Q. Now, are some of these needs that would be reflected in this things that would be more difficult to identify or to quantify?

A. Well, yes. I think water is needed for aesthetic purposes, for example, and in some instances, the aesthetic may have a higher value than most anything else you could put on that water at a given point. And that's an example where it's difficult to get agreement between [8] experts, as to just exactly how much you need.

Q. Now, these inventories that have been put together, what was the propose of these inventories?

A. Well, we have an inventory, water inventory, for many years, everyplace I have ever been. It was quite sketchy and incomplete, but we did have one of sorts to identify within the Forest Service, what our needs really were, and what our actual uses were. Then, as time went on, we recognized a need to also inform other people what our demands and requirements are. We have been notifying states as to our estimated uses and needs for several years now.

Q. You say you have notified the states of these needs? Has this been done all over the western states?

A. No, it hasn't. It's been done in those states where the inventories have been brought up to the point where we thought it was reasonably close as we could identify at the time.

Q. Have you ever considered that your inventory had reached that stage in the State of New Mexico?

A. No. People in this region, when I inquired as to where they hadn't notified the State of New Mexico, they felt it just had not been perfected adequately. But I think that perhaps they're getting much closer now.

THE COURT: Let me ask you, Mr. Carlson, this was [9] done state by state rather than forest by forest or anything like that?

THE WITNESS: No, sir, it's done watershed by watershed. We have a thing we call our PWI, project work inventory, which is a—well, I won't go into those details. But we identify various watersheds, and the inventory is completed by the watershed and then by the next larger drainage. You can accumulate this information for a particular watershed and drainage area. And then we're trying to accumulate it so that it can also be identified by state.

BY MR. REDD:

Q. Now, in setting up these watershed inventories within the national forests with respect to future needs, has the criteria been to include everything that would be within the forest purposes for which water could be used on that watershed?

A. Well, everything is, we reasonably feel, at this time. We have made no effort to go all out and identify all the difficulties on the land or this sort of thing that might be a possible thing in the future, but try to keep it in a practical vein.

Q. Now, by practical vein, do you mean the things that the water probably would be used for in actuality?

[10] A. Yes.

Q. And what are some of the things that would control whether the water would or would not be used?

A. Well, you have a use on the land which requires water, it probably would be used there. I'm not sure I fully understand the question.

Q. Well, is construction of structure sometimes necessary for some of these uses?

A. Oh, certainly.

Q. And is there any limitation on the construction of these structures?

A. I don't know of any limitation.

Q. What about your budget?

A. Oh, the budget. We have very limited funds within which to operate, and the Forest Service has never taken on any major water development that I know of.

Q. Do the desires of the local people ever have any bearing on the development of projects that might use water in an area?

A. Quite often. We have cooperated with a number of states where small fishing reservoirs have been developed. Fishing and other recreational purposes, this sort of thing. We have some impoundments that are needed for our own administrative use, but most of these are pretty small.

[11] Q. Now, do you have any familiarity at all with the inventory, the computer printout of the inventory of the Mimbres Watershed within the national forest in New Mexico?

A. I have looked at it, but I'm not personally familiar with the details of it.

MR. REDD: I have no further questions of this witness.

THE COURT: You may cross examine.

MR. BLOOM: Paul Bloom, Special Assistant Attorney General for the Plaintiff, State of New Mexico.

EXAMINATION

BY MR. BLOOM:

Q. Mr. Carlson, first off, I believe you mentioned some uses made by other people than the Forest Service itself that complicates this study we're talking about, uses made by lessees or special-use permittees?

A. I don't recall making that statement.

Q. All right. In the course of making inventories, you're talking about, or the ones that are made under your general supervision in the forests in the United States, do those inventories routinely include, in the cate-

gory of present uses, all those uses now being made by people acting under special-use permits from the various national forests?

[12] A. No, I wouldn't include all of those.

Q. Would it include any of those?

A. Conceivably it could, if the water that was being used by a special-use permittee with a legitimate reserve use.

Q. And do I understand it, in your judgment of your job, that's your decision to make, as far as these inventories go?

A. Well, I wouldn't say that it is.

Q. Who would decide whether a fellow who had a special-use permit on a thousand acres of forest land, say for—for example, for a ski basin operation, ski lift and slope, and maybe the land rented for overnight facilities and all the other related recreation facilities of a ski basin—we will assume this is all happening inside a national forest under a special-use permit. Now, is that or is that not treated by the U.S. Forest Service as a reservation purpose?

A. The Forest Supervisor upon whose national forest the land lies, he is the one who normally issues the special-use permit. Now, if it's a much, much larger operation, that responsibility would rest with the Regional Forester.

Q. Possibly I'm not following you. Do I understand you to say each forest supervisor who issues under his local authority a special-use permit for ski basins has the [13] implied power to determine whether or not that's a use of water by the United States, or use of water under state law by the lessee? That's what I am getting at, is whether that's counted by the Forest Service, the water use associated with that ski basin? You don't have any national policies on whether such a water use would be a federal water use or a local water use?

A. Well, it would depend on the circumstances in each case, I think.

Q. Well, then, I think you're telling me that there is no National Forest Service policy as to ski basins, for instance? It might or might not be counted as a federal water use?

A. That's possible.

Q. I see. So if I ask you about the one up in Santa Fe or Taos or some others on partially or entirely on National Forest Service land, you would have to tell me to talk to the Forest Supervisor in each case to find out if this was claimed as federal use or something done under state law; is that right?

A. I certainly don't review all of those.

Q. But am I correct that as far as any national policy goes with the Forest Service, in your judgment, it would be strictly a local decision of the Forest Supervisor whether "he complied" under a reservation doctrine, or [14] leave it to the leasee to claim?

A. I presume it would become a contested matter, that it would be a decision for the Court.

Q. No. I type my question, Mr. Carlson, to the state to which you make inventories before you go into any course. I understand you're telling me there is no uniform national policy, just a matter that each supervisor who is in charge of an inventory can decide whether or not to claim this water use made by a special-use permittee for a ski basin as a federal use or as a local use?

A. No. I think this is spelled out pretty well in the Forest Service Manual.

Q. What does that say?

A. Some of the uses—there is a number of uses that are defined and would include such developments. If they are located on National Forest land, if it's a recreation use of the National Forest, and if the water that's being used there comes from the National Forest.

Q. All right. Now, we're getting to what I was originally asking about. I understand you're telling me now that your view is that anything, that you have a legal right to issue a special-use permit, you have the right to count as water use for a federal purpose of the forest?

[15] Q. All right. Let's take a ski basin. Say, take the one up at Santa Fe or anywhere in New Mexico. A man leases, gets a special-use permit for enough acreage and suitable site, and wanted to start a ski basin operation. He is going to use a lot of water and so he gets a permit from your Forest Supervisor, and he drills wells,

and he doesn't comply at all with state law, just believes he is acting under the authority of the United States and under his special-use permit. Do you or do you not have a National Forest Service policy when it comes to inventorying water rights in the National Forest with respect to how you treat this man?

A. Well, yes. I think we have a policy.

Q. What is your policy?

A. Well, I think I stated it before, that if it's a legitimate National Forest use, if it's located on the National Forest, and it's for a public recreation service, and the water is to be used on the National Forest, it comes from the National Forest, it could be claimed under reservation.

Q. You say it could be? I was following you right up to that point. When you say it could be, does that mean you leave the discretion entirely to the Forest Supervisor who is in charge of the inventory, whether he will do it, or is there some national criteria or [16] written policy, instructions, or manual guideline to tell him whether or not he should claim it, and if so, how he should measure it?

A. Insofar as the measurement, we don't have the techniques spelled out in our water rights activities, no.

Q. Well, I wasn't just asking how to measure. I'm still trying to get over the threshold problem. When you have a forest, you have a special-use permit, you have a ski basin,—

A. Yes.

Q. —do you have a national policy constructed under which your basin, your Forest Supervisor, is to claim that or not claim that, when an inventory is being made of Forest Service water uses in that watershed? When I have asked you this before, you told me that if it's a lawful purpose like recreation, which you assumed it is because you gave them a permit that the Forest Supervisor could do it. I want to know, must he do it, and under what authority and what guidance you have given him from Washington of how to handle that? If there is no such policy, I would appreciate you telling me that.

A. Well, I thought I had explained it to the best of my ability.

Q. Well, all right.

A. Since it is, then he could claim it, if it is legitimate [17] recreation use and legitimate facilities for public purposes on a National Forest.

THE COURT: Tell me this. Do you have any written manual or directory as to claims for water, or however you want to describe it?

THE WITNESS: Yes, we do.

THE COURT: Wouldn't that give the answer to the question he is asking you?

THE WITNESS: I think it would, yes.

THE COURT: Do you have it with you?

THE WITNESS: I'm not sure if I have a copy. I think I do.

MR. BLOOM: I would be glad to have the witness consulted and show it to me, if he can find it.

THE COURT: Can you get it quickly?

THE WITNESS: We're in the process of revising some of the wording in our manual, and here is our policy.

THE COURT: What are you referring to?

THE WITNESS: I'm referring to Forest Service Manual, Title 2500.

BY MR. BLOOM:

Q. Watershed Management?

A. Watershed Management, and under Section 254103, the policy is spelled out.

[18] Q. Would you read that into the record, please?

A. "Water necessary for the development, use, and management."

Q. Excuse me. Why don't you start up here?

A. All right. "Objective: The objective—" I have, "Forest Service is to obtain sufficient quantity of water in coordination with legal authority to provide for the development, use, and management of National Forest system resources, with due consideration for the needs of other water users." Now, you want to read on the policy?

MR. BLOOM: Just a second. Mr. Redd, can we agree to have this stipulated into the record, this whole page, so we don't have to read it?

MR. REDD: Stipulate that whole thing if you like.

THE COURT: Let's keep it down as much as we can. That page has got your policy in it, Mr. Carlson. I think it would suffice. Tell me, does it?

THE WITNESS: Yes, it has the policy statement as it relates to water necessary for development and use.

BY MR. BLOOM:

Q. I'm afraid it doesn't answer my question, but I would be delighted to have it in the record.

THE COURT: I wonder if any of the local attorneys— [19] do you have a zerox machine handy here? Just let us have it a minute, Mr. Carlson.

THE WITNESS: Okay. Now, one problem, if we go to other pages, I have some marginal notations which have to do with the possible revision of some sections of this manual, and they would not apply to our current manual policies.

THE COURT: All right. With that understanding, let's have that page, and have it zeroed and give him the page back.

BY MR. BLOOM:

Q. Mr. Carlson, in my brief reading of this page over your shoulder, I didn't see any reference to inventory. It doesn't talk about inventories, does it?

A. No, that probably doesn't.

Q. So what you have showed us as policy in your Forest Service national manual, it's a general statement of policies in respect to water. It says you're supposed to use water in proportion to the water available. You're supposed to use water reasonably; that sort of thing, right?

A. Right.

Q. Okay. Let's come back to this inventory business that Mr. Redd asked about on direct examination, which is of interest to all the parties in this case. You have

[20] identified, I think you have explained that an inventory of present and future uses of water for the Gila Forest in the Mimbres Drainage by local forest personnel, that's correct, isn't it?

A. That's correct.

Q. When was this made?

A. I'm not certain as to the original date, but it was revised some time this spring, 1973.

Q. Do you know whether the revision has been supplied to any agencies of the State of New Mexico?

A. I'm not aware that it has.

Q. Have—are you aware that the original was submitted to this Court and to the counsel in this adjudication so many months ago?

A. Yes.

Q. But you don't know whether the revision has been made available to us?

A. No, I don't.

Q. It has not been by you or your office?

A. No, it has not.

Q. Okay. Now, still trying to follow exactly how you handle the inventories locally,—and incidentally, are these subject to review in your office nationally before their finalization or approval, whatever is required?

[21] A. No, sir.

Q. They're simply a product of each local Forest Service administrative unit, watershed by watershed?

A. I think they're assembled and very carefully reviewed at the regional level within the region where they originate.

Q. Okay. I see. All right. Now, coming back to this problem of special-use permit, you would agree, wouldn't you, that in many forests in the western United States, a very considerable is not a dominant part of the water actually used in those forests is used by special-use permittees, as apart from use made by uniformed personnel of the Forest Service itself, isn't that correct?

A. I don't know that that's a fact.

Q. Okay. Then let me go back to fundamentals, and ask you, what are the largest class of water uses in the western United States? Then we can take it step by step.

A. Well, I would suppose it would be in-stream flows needed for various purposes.

Q. How do you classify an "in-stream flow" as a use?

A. Fishery studies, aesthetic purposes—I could expand that.

Q. We will accept your definition of water flowing in [22] the national water course without any diversions as use for the purpose of your answer.

A. All right.

Q. Now, I'm more interested in uses made by man-made diversions, either through wells or dams or ponds or other man-made works that divert and cause the beneficial use of water. What are the principal categories in such as these?

A. We divert water for irrigation of pastures, I suppose, would be one of our uses, for domestic purposes.

Q. Now, you say irrigation of pastures. Are you trying to improve on nature, or is this for grazing purposes?

A. No, grazing off our administrative livestock.

Q. You distinguish between that and livestock owned by leasees?

A. Right.

Q. Is the irrigation of pastures for the grazing by leasees or permittees for the forest an important class of use in the National Forest?

A. Not to my knowledge, anywhere.

Q. Could you continue?

A. The other diversions that we have—well, we divert water for campground sanitation systems.

Q. Those require relatively small diversions, don't they?

A. That's correct.

[23] Q. You're talking there about water spigots or small domestic wells and storage tanks and spigots for sanitary facilities at a campground, aren't you?

A. In some of the larger campgrounds, we have larger sanitation systems with the evaporative pumps and this sort of thing for treatment of the sewage.

Q. Yes.

A. And there again, the actual consumption is quite minor.

Q. All right.

A. We have some impoundments for—I guess we mentioned—livestock use. We have impoundments for fisheries and recreation, which would be small lakes. I suppose those are the principal uses that we have.

Q. All right. I note you have not mentioned, I think, this list either, water use by/and in association with the grazing of cattle owned by permittees or leasees, and you have likewise excluded water associated with recreation projects not directly constructed and operated by the Forest Service itself, for instance, the kinds I was referring to when I spoke of a large ski basin operating under special-use permit, both those classes of uses are fairly common with western forests, are they not?

A. That's true, they are. And water is used for those purposes.

[24] Q. All right. Are such uses customarily shown, to your knowledge, as Forest Service uses under the reservation doctrine—that is, Federal uses claimed under the reservation doctrine, and the inventories that have been made and are now being made in the program of inventory water rights that you have been describing to the Court?

A. Yes, I think they are.

Q. They are?

A. Yes.

Q. All right. In fact, in the inventories that's been submitted to the Court here, a very considerable part of the annual depletion or consumptive use is actually consisted of use made by grazing, isn't that true, in association with grazing operations?

A. I'm not that intimately familiar with the figures.

THE COURT: It could very well be.

BY MR. BLOOM:

Q. Do you know whether any—when the inventory, for instance of the Mimbres Drainage of the Gila Forest talks about stock water, whether it's talking about stock owned by the United States Forest Service or stock owned by leasees?

A. It's primarily owned by leasees.

Q. Right. You don't know of any administrative stock of [25] any substantial number being run in the Gila Forest in the Mimbres Drainage, do you?

A. I don't know of any.

Q. So if we can take those of all of the stock as belonging to leasees, then that brings me back to the question of your—of the origin of your national policy of handling those. Do I understand you correctly now as telling me that any use made by a leasee who has, in your judgment, a valid special-use permit, whether it be for a ski basin, or whether it be for grazing his own cattle, that any water use by any depletion in the forest caused by that permitted use is to be included in these inventories and is included as a National Forest use?

A. Under the conditions I mentioned previously, yes.

Q. So, I mean, under the conditions in any question—can you answer yes?

THE COURT: I don't understand the distinction you're making. I understand his answer was yes.

MR. BLOOM: But he said under the conditions of his previous answer, and I can't remember which answer he was talking about.

THE COURT: You can correct me, but I—if I understand you correctly, you said that if the uses of water were made on the reservation under a permit, that that would be counted as a Federal [26] use in your inventory?

THE WITNESS: That would be our policy, if the water comes from the reservation and is used on the reservation.

MR. BLOOM: Fine, thank you.

THE WITNESS: And if it's on proper use.

BY MR. BLOOM:

Q. Do you have any written instructions or guidelines from the Washington Office of the National Forest Service, U.S. Forest Service, stating that, stating the policies which you have just agreed with me to be the policies of the Forest Service?

A. The entire guidelines we have are in that manual that I had in my hand.

Q. Now, the page that you identified does not refer to inventory, does it?

A. No, there is another section.

THE COURT: Could you get that?

BY MR. BLOOM:

Q. If I could, it pointed out to me that on Title 2500, Watershed Management, it's duplicated on the second page, Part 3B, says under Forest Supervisor, it says: "The Forest Supervisor may be authorized to develop and maintain the inventory of the National Forest Service uses." And then somebody has inserted under that [27] "foreseeable needs."

THE COURT: Foreseeable needs. That refers to changes in process.

MR. BLOOM: Right.

THE COURT: Is that the section you were referring to, Mr. Carlson?

THE WITNESS: Anything that's written in there that hasn't been typed is not the current policy.

BY MR. BLOOM:

Q. So current policy does not include any reservation to foreseeable needs in your inventory, does it?

A. Yes, sir, it does.

Q. Where does it? At least, it doesn't in 3B, under Forest Supervisor; that's clear, isn't it?

A. Under Section 2541.3, Inventory of Water Uses, it states, "The Forest Supervisor will prepare and maintain inventory records to show (1) water rights and withdrawn lands that is valid against the United States; (2) existing and foreseeable future water requirements of National forest systems; and (3) a map record keyed to these inventories." These records should be brought up to date annually.

Q. All right. What further instructions are given in the current form of this watershed management manual to our Forest Supervisors in respect to telling them whether [28] they should or should not include in those inventories water uses made by permittees and leasees? Do you see any reference to that point in your manual?

A. Would you repeat that again, please?

Q. Be glad to. Mr. Carlson, my question again goes to some sort of uniform written policy from any language in that manual instructing Forest Supervisors what they're supposed to do with water uses made by leasees and permittees of the forest in respect to water uses made by them, by the permittees. Now, you have told, in your opinion, those things should be included by the Supervisor in the inventories. I want to know if you told them that in your manual, and if so, where?

A. There is a section, Reportable and Non-Reportable Uses, in here with no intent, in this Section 2541.12, that it be entirely all inclusive. But it includes a number of examples of reportable and non-reportable uses.

THE COURT: Is anything said in there about leasees or permittees?

THE WITNESS: Not specifically, no.

THE COURT: It's your view, though, if I understand you correctly, that those uses would be included under that direction?

THE WITNESS: That's correct. There is an item here with this which is National Directions, which [29] includes developed water for recreation area uses. It doesn't distinguish as between an area that we would have developed or some leasee would have developed.

THE COURT: Would it be of any help to us if we had that copied?

MR. BLOOM: I would be glad to have that in.

THE COURT: That page?

THE WITNESS: Well, maybe you would want more than just that page.

BY MR. BLOOM:

Q. How long is 2541?

A. It isn't really a tremendously long manual. Do you want to look and see what part of that you would like?

A. I would like to have all of that.

THE COURT: You can have them zeroxed, make three copies, please.

BY MR. BLOOM:

Q. We have established then, as I understand it, that Section 2500, Watershed Management, 3B, where it refers to inventories of national forest system uses, does not now refer to foreseeable needs, but the other section, 2541, breaking down the inventory, does, the one you have just read to us. It includes what you call foreseeable future water needs of the forest?

[30] A. I think the title is present and foreseeable.

Q. Present, yes. All right. I think that you have agreed with me earlier, haven't you, Mr. Carlson, that a very considerable part of the total depletion cost within some of the national forests, within the western states, is in fact caused by these permittees and leasees carrying on grazing and recreation activities under such permits?

A. Percentagewise, I have never made any analysis, but there is certainly some consumption there.

Q. Now, if we look at the present inventory that was made by people under your direction or at least your local Forest people, it shows something like, what, eighty-some acre feet of annual present uses? If you have, for instance, just one major recreational use in that watershed by a permittee or leasee for a recreation project—for instance, assume that a ski basin was feasible there or something of that kind—that one use of it, if it were a major use, it could without surprising you very much, double or triple that annual depletion, couldn't it?

A. Conceivably could.

Q. Yes. And in fact, you know, don't you, that there are in New Mexico a number of national forest locations where considerable blocks of government land have been [31] leased to, or permitted for ski basin operations under special-use permits?

A. I have heard there are some.

Q. Then you know that they—in the cases of Taos and Santa Fe, at least, actually involve considerable overnight accommodations, with restaurants and kitchens and restrooms and other recreational facilities, don't you? Or are you familiar with those?

A. I'm really not.

MR REDD: I wonder if I could ask for an offer of proof to connect this in with the Mimbres Watershed?

THE COURT: I think it would be more important if we limited it to Mimbres.

BY MR. BLOOM:

Q. All right.

THE COURT: I think we have got the general policy now. I don't think it makes any difference what they do up there.

MR. REDD: We're talking about probability, and it's all in the same state.

THE COURT: I don't know if there is any such probability.

BY MR. BLOOM:

Q. Are you familiar with the climate and snowfall condition [32] and recreation for winter sports in the Gila Forest?

A. Just in a very general way.

Q. Is it not true that there is generally throughout the western part of the United States a growing—a sharply growing public demand for winter sports, recreation opportunities?

A. I think there is for all kinds of recreation.

Q. In fact, the ski business is a booming business all over the west, isn't it?

A. Seems to be.

Q. And your forests are constantly being approached by people who desire to get special-use permits for ski basins and operations, aren't they?

A. I'm not involved in those things, but I suppose they are.

Q. Do you know in fact that the Forest Office in Albuquerque, the Regional Office, is in fact—right now has underway consideration of certain requests of Elk and other mountains in the state, where a private individual or business people have asked for the right to

develop new ski basins in New Mexico for winter sport complexes and recreational complexes on National Forest land?

A. No, sir, I'm not familiar with this.

Q. Are you familiar with that very large request for a multi-million-dollar winter sport recreation complex development in the Sequoyia National Forest which [33] recently had a great deal of attention through the environmental impact of that proposed project?

A. I don't know which one you're referring to.

THE COURT: For our purposes, Mr. Bloom, that we know that they do grant permits for this purpose and that they do use water.

MR. BLOOM: I was just trying to get beyond that into probability, but apparently this isn't the right witness to do that with.

BY MR. BLOOM:

Q. Now, that manual you showed me says that an area where water is scarce, you're supposed to use it sparingly. Is that a principle that the Forest Supervisor under your direction faithfully follows in making these inventories?

A. Insofar as I know.

Q. All right. How would you translate that policy directive into the situation of a forest which is in headwaters of a stream that was already very much over-appropriated in terms of water uses, if you understand my question?

A. Let's try that one again.

Q. Okay. Your forest manual says the Forest Supervisor is supposed to be governed by the policy objective in areas where water is scarce and in very great demand [34] locally. It's supposed to be used sparingly and reasonably. Bearing in mind those other demands for it, these non-forest demands, how do you translate that into the appropriation of an inventory in which you are making claims for future and foreseeable forest uses?

A. Well, I would translate that to mean that we are not going to waste water.

Q. Is that all?

A. I think that would be the primary consideration.

Q. Is there any instructions from your office to look for the over-approach when they make these guesses or estimates as to future requirements?

A. No, sir.

Q. Why isn't there? It seems to me that would be implicit in the directive you gave me, that you told them to use water, where it is scarce, sparingly. As I understand, you're telling me that the Forest Supervisors are entitled to ignore the fact of the complete appropriations or the chronic shortage of water of local streams when they start reading their crystal balls and guessing what they're going to use in the future; is that correct?

A. Well, the authority of the Forest Supervisors is somewhat broad as it relates to the particular land for which they have responsibility.

Q. All right.

[35] A. And they are directed to manage those lands for those various purposes, and in the process of doing that, there are physical limitations in what they can look outside for and accomplish in that regard.

Q. I'm not talking about physical limitations, only as to how much water comes down out of the watershed. I'm talking about a situation where the forest is in the headwaters, and there is an entire water-using economy consisting of towns and industries and individual domestic wells. You have got a Forest Service manual that tells your Water Supervisor to use it sparingly where it's scarce, but I understand you to say they're entitled to ignore the appropriations of water on this steam system when they make their estimate as to how much they will use in the future?

A. They will use a reasonable amount that is needed for National Forest purposes.

Q. Looking in isolation, a part on over-appropriated systems?

A. I don't know of any of them that are completely isolated.

Q. If they're not bound to look to the future, they're doing it in isolation as a legal matter?

A. That I don't know.

Q. You would agree, wouldn't you, that if the Court allows a national forest to develop additional uses—or you [36] just do it on your own, let's set aside the Court—you make an inventory and you such-and-such-present and such-and-such-future needs, then you start developing your new uses that haven't been used before, and you're at the top of an over-appropriated system, that by exactly the amount that you increase you have decreased the supply? I mean, that is just a matter of physics?

A. Hydrologically, it may or may not be correct.

THE COURT: Due to shortening your examination, looking at the second paragraph, 2541.14, it says, "In drainage where water has been completely appropriated under state law, subsequent to the reservation date, use of water for National Forest system purposes will be expanded on a more careful evaluation of all water uses and needs to fully justify such expansion. Non-National Forest use of water has been established under state law. The management and benefits of forest uses and activities depend upon the particular water supply," and so forth. Is that what you were getting at?

MR. BLOOM: Yes, sir. I believe that covers the point. If perhaps the witness hadn't understood my question, he could perhaps have called my attention to that, but that does go to the point [37] I was asking about.

THE COURT: If it would help the witness, there is a copy of 2541.

BY MR. BLOOM:

Q. Then, if I understand the provisions which Judge Moise has just read in 2541.14, it is a matter of policy that the Forest Service is reluctant to, in the opinion of the National Forest; is that correct?

A. We are reluctant to do that, yes.

Q. All right. I assume that's for the reasons I mentioned, that it has a direct economic impact on those people, doesn't it?

A. Normally it does.

Q. Yes. Do you know whether the Mimbres Stream System is a fully-appropriated or over-appropriated stream system?

A. No, I'm not aware of that.

Q. Why did the Forest Supervisor revise the inventory for the Mimbres Watershed of Gila National Forest?

A. It's our policy that the inventory be reviewed annually and updated where any errors, corrections or changes might have been discovered.

Q. In other words, you have an inventory which includes a component called future uses, and then as each year of that future becomes past, it is revised, your inventory, [38] and checked on to see whether you have called the shots correctly?

A. That might be part of it, or we may have overlooked a diverted use, or we may have abandoned a diverted use which is then removed from the inventory, whichever kind of correction is needed.

THE COURT: Or you may have developed some new potential use?

THE WITNESS: Possibly.

BY MR. BLOOM:

Q. For how long, Mr. Carlson, if you have, have the National Forest lands of the western United States been used extensively for ski basin operations?

A. Well, are you talking strictly now about recreation-type skiing?

Q. With associated lodging facilities, sir, yes, sir.

A. I really don't know too much about it, but I do know that there were some developed ski areas in Colorado in the thirties, probably fairly early in the 1930's.

Q. In National Forest lands?

A. In National Forest lands, and probably before that. I'm sure there were ski jumps there that were developed in places of rather a minor beginning.

Q. Well, the larger national forest ski basin facilities have principally gone in since the Second World War, [39] haven't they?

A. I'm sure they have been materially expanded during that period.

Q. Are you then able to tell us today that you are—you or the Forest Service—able at this time to anticipate with certainty all potential recreational uses of water on the National Forests?

A. No, sir.

Q. In fact, it is conceivable, is it not, that just this one whole class of major water-using facilities for which ski basins were developed in the thirties, forties, and fifties are new and equally large and unforeseeable? Now, unforeseeable recreational use may develop in the eighties or nineties of the century?

A. There have been all kinds of recreational developments, such as the ski-mobiles and this sort of thing that have come along, snow-mobiles, lots of people enjoy them at the National Forests, where it's reasonable to do so. I think through the years we find all kinds of new things to do with the American public.

Q. Yes.

THE COURT: But that's what you are talking about, possible long-term leases for development of a recreational subdivision—

THE WITNESS: Are you talking about, say, [40] summer-home-type things?

THE COURT: Yes.

THE WITNESS: No, I think we're just about out of that business on National Forest lands. As I understand our current program, we're not getting into developing any new ones of those.

THE COURT: Or permitting it to be done?

THE WITNESS: Only on a very minor basis where there may have been something already in the developmental stage in the past.

BY MR. BLOOM:

Q. Now, Congress could change your policy on that, couldn't they?

A. That's possible.

Q. The population is steadily growing in this country, and the demand for summer homes in high country will no doubt continue to grow in this century, won't it?

A. It's true, but in a number of places where these things have grown and expanded and almost got out of hand, it's not a—in some of those places, those lands have been deeded over as town sites or gone out of the reservation. They're not National Forest lands anymore.

Q. Are you aware, Mr. Carlson, that in certain forests in the Pacific North Drainage areas, it is accepted, at least experimentally accepted as management practice, [41] to irrigate native timbers?

A. I have heard that some companies are doing this.

Q. Are these companies acting under leases or permits from the United States Forest Service?

A. Not to my knowledge.

Q. You're not aware that this practice is being done in forest lands?

A. Well, it's done on forest lands, but not national, not to my knowledge. Now, there are some exceptions to that. We do irrigate our nurseries where we grow young trees for planting, and we do have some seed orchards which are primarily for seed production, which are in the nature of timber stands. But these are rather small areas, and occasionally we do practice irrigation on some of those.

Q. Logging is one of the lawful purposes of the Gila Forest and Mimbres Drainage, isn't it?

A. Right.

Q. And if sometime in the future the policy of Forest Service is such as to allow, and assume further that the economics of the lumber industry was such as to encourage the irrigation of natural timber to enhance growth and commercial profits in logging operations, that's a theoretical potential for water use in the Mimbres Drainage, isn't it?

[42] A. I suppose it could be; I don't know.

Q. And as you told me, that technique is being used in the Pacific Northwest on timber companies?

A. On private timber land.

Q. Now, isn't it essentially your job and that of the Forest Supervisor to make these inventories to plan the wise, long-term use of Forest Service property interests in waters and public waters?

A. That's part of the job.

Q. Isn't it easier for you and the Forest Supervisor to have this job of administering and conserving the publicly-owned properties that you know what you own?

A. I'm not sure I understand that question.

Q. Well, if your job is to conserve and administer to the public, wouldn't you agree with me that it makes your job easier and more certain if you know exactly what it is that you own and that you're supposed to be conserving?

A. We, of course, are approaching that question through our inventories, which are continually updated.

Q. Wouldn't it necessarily make your job easier and the Forest Supervisor's job easier if we could waive the foundation, and in every watershed in the country where you have responsibilities, wouldn't that take a lot of the uncertainty and confusion out of your job?

[43] A. I don't see that it would.

Q. You wouldn't then have to worry about the effects you were having on other people and whether you were using too much or too little? You would know exactly what your property was and exactly what your neighbor's property was, wouldn't you?

A. We would know that.

Q. It would add certainty to your operation and clarity, at least?

A. It would add certainty; I suppose it would.

Q. Yes. The only thing it would do is keep you from going above that limit. After that, it would only be a disadvantage?

A. It would do that.

Q. Yes.

MR. BLOOM: I have no other questions.

EXAMINATION

BY MR. REDD:

Q. If you had an adjudication and it cut off certain valid forest rights, would that help your administration?

A. No.

Q. Would an adjudication make any more rain fall on the forests?

A. Not that I know of, no, sir.

[44] Q. Mr. Carlson, you mentioned earlier that certain inventories had been supplied to some of the other states and were a little more advanced?

A. Yes.

Q. And when these were supplied to them, was any forwarding letter, stating what the purpose of this inventory was?

A. Yes.

Q. Do you have copies of any of those with you?

A. I did have them here, but I must have left them on the table.

Q. I would like to have these marked as exhibits. This is a letter notifying the State of Washington as to sending a copy to the State of Washington. This is for the State of Wyoming and this is for the State of Colorado.

MR. BLOOM: Could Mr. Redd tell us what the relevance of the letters written would be?

MR. REDD: Yes. I would be very happy to tell you. I want to show by these that these were not intended as limitations on the water rights, that they were not intended to be a final inventory, but the purpose of these was to advise the state of what the best estimate was of the amount of water that would probably be used in the future, so that they could use these for planning purposes.

MR. BLOOM: Wouldn't the best evidence rule cover [45] the situation, that it seems to me that the document which isn't yet in evidence ought to speak for itself?

THE COURT: Let's not argue. My only desire would be to keep out any surplus stuff.

MR. REDD: Yes, sir, Your Honor. Just the letter in each case is all I desire to put in. The other is there if they want to examine it, but the letter in each case is all that we really want.

THE COURT: I see here, for example, on this address to Denver, Colorado, August 1st of '73, June 18, '69; August 1st, '73. All right. Have them marked. Mark these, Mr. Reporter.

BY MR. REDD:

Q. Mr. Carlson, I hand to you a copy of what has been marked as U.S. Exhibit 1 and ask you to identify it?

A. This is a letter that was written by the Regional Foresters in the northern region of the United States Forest Service, notifying the State Water Engineer in the State of Washington as to the water uses requirements and rights inventory of the U.S. Forest Service in the Northern Region within the State of Washington.

Q. Now, I show you what has been marked as United States Exhibit 2, and ask you to identify it?

A. Exhibit 2 is comprised of three separate letters [46] written to Mr. Floyd Bishop, State Engineer for the State of Wyoming, notification of current and future, under the reservation principal on National Forests in Wyoming. The first letter was dated August 8, 1969. The second letter was an update, which is dated May 19, 1970. And the third letter is a future update of the original inventory, which is dated August 1, 1973.

Q. Now, Mr. Carlson, I show you what has been marked as U.S. Exhibit Number 3 for identification.

A. Number 3 is essentially the same as Number 2, except that it's the notification to the State Engineer for the State of Colorado, and it is also three separate letters, dated June 18, 1969, an update of May 19, 1970, and a further update of August 1, 1973.

Q. Now, Mr. Carlson, is the purpose for these inventories stated in that letter?

A. Yes, sir.

Q. And could you summarize for the Court what is said with respect to the purpose of these inventories?

A. I could read that. The letter outlines the type of matter—or material that is being furnished to the State Engineer, that it is a notification of current and future contemplated water uses under the reservation principle. It explains a little bit about the print-out sheets which were included, tells about the numbering [47] system. And there is a paragraph here to enable you to see at a glance the existing and foreseeable uses of both surface and underground waters as we see them at this time. A summary has been attached, so there is also a summary of what the uses are as would see them now or at the time the letter was written.

Q. Now, is anything stated in these letters with respect to the intent, as to quantity in our rights, as to setting a limit upon our legal rights? By ourselves, I mean the Forest Service of the United States, rights as to the use of water?

A. All of these letters show that it's a notice in the interest of the quantity. It's not intended to limit the quantity.

MR. REDD: I have no other questions.

THE COURT: Do you want these admitted?

MR. REDD: Yes, sir.

THE COURT: Do you object?

MR. BLOOM: We object. He didn't write them, and in the second place, they are irrelevant because they are to officers of other states involving other stream systems not within this suit. And furthermore, Mr. Redd has already told us that they aren't in respect to the Mimbres, that they give notice to the state officials. So since [48] what was done here is not done in New Mexico, I don't see the relevancy.

THE COURT: They will be admitted for what they are worth. You can develop what wasn't done here.

EXAMINATION

BY MR. BLOOM:

Q. Do you understand correctly, from either your earlier testimony or Mr. Redd's statement, that the comparable letter to the two has not been prepared and sent to the State Engineer of New Mexico?

A. That's correct.

MR. REDD: I can perhaps at this time—perhaps at this time it would be desirable to remind you and Mr. Bloom that a letter was sent with the inventory to the State of New Mexico, which does contain very similar language to this.

THE COURT: Well, I have a copy dated July 21, 1972.

MR. REDD: Yes, sir, Your Honor.

THE COURT: I am wondering if that is a record in this case?

MR. BLOOM: No, Your Honor. As far as I know, it's not.

MR. REDD: If not, perhaps we should have it admitted as evidence at this time.

THE COURT: I think perhaps you should.

[49] MR. BLOOM: How about if you withdraw the other three? It seems to me if we're going to follow relevance, if a letter has been addressed to the New Mexico Water Officials—I gather in this case you're talking about the letter addressed to me? I'm not a water official, but for the purpose of this case, it would seem to me that that's the only one of any relevance at all.

THE COURT: The others don't hurt anything and I don't know how the language compares because I haven't compared it, but it occurs to me that—I don't know how we're going to get it in the record if we don't have it copied. This is a rather voluminous deal, and as I say, I'm anxious to keep the record down as much as possible. But it seems to me that—

MR. BLOOM: There are a lot of copies around. You're talking about the whole inventory?

THE COURT: I'm talking about the printout.

MR. REDD: Your Honor, all I was suggesting that be admitted at this time was just the forwarding letter, since this is—

THE COURT: You may offer it. Have it marked and you may offer it.

MR. REDD: At this time, Your Honor, I offer what [50] has been marked as U.S. Exhibit 4, which is a letter dated July 21, 1972, to Mr. Bloom, Mimbres Valley Irrigation Company versus Tony Salopek, No. 6326, and signed by me on behalf of the Assistant Attorney General for the Land and Natural Resources Division, forwarding certain papers to Mr. Bloom. This is offered.

THE COURT: Any objection to that?

MR. BLOOM: I have an awkward situation. If it's offered, it's unsworn testimony, and Mr. Redd is here and can take the stand and take the oath and give that testimony. If it's not offered for the truth of the matter asserted, I don't understand what the relevancy is.

THE COURT: It will be admitted for what it's worth. And I take it the last paragraph is comparable to the language of the others? The first part of it is the other thing?

MR. BLOOM: The letter which you have just identified, Mr. Carlson, for Mr. Redd was a cover letter with an attachment?

THE COURT: I don't know that Mr. Carlson has ever seen it. There it is.

THE WITNESS: I didn't see this one.

[51] BY MR. BLOOM:

Q. With a bundle of documents consisting of a computer printout sheet and other material composing inventories for the Mimbres Drainage of the Mimbres Watershed of the Gila Forest, does it not?

THE COURT: The first part—it's just the last paragraph, I think.

BY MR. BLOOM:

Q. Yes. There are a group of copies of withdrawal orders that are not—

A. Right.

Q. You have a bunch of printouts, don't you?

A. Right.

Q. Which are Forest Service printouts? Take your time and examine them.

A. Might take quite awhile.

Q. I don't want you to study them intently, Mr. Carlson. I just want you to identify them as National Forest computer printouts constituting water right claims for the Gila Forest and Mimbres Drainage; can you so identify them?

A. I couldn't, because I'm not familiar with all the numbers, but I assume that's what it is. Watershed 025—

A. It lists current foreseeable national water use, doesn't [52] it?

A. Right. I presume that's correct.

THE COURT: Could we put it this way, Mr. Carlson? Is that the form of the inventories as they come out of the computers?

THE WITNESS: This is the general form, and it varies in different states, because the different states wanted it in a little different form, and we have tried to work with the state in developing it.

THE COURT: Let me ask you this in connection with these Exhibits 1 through 3, with the Washington, Wyoming and Colorado letters. Was there a printout such as this?

THE WITNESS: Yes, sir. It was a large printout.

THE COURT: Plus a summary?

THE WITNESS: Plus a summary.

BY MR. BLOOM:

Q. You have identified this—you can identify that as being for the Mimbres Drainage?

A. I'm not that familiar with the particular numbering on it.

Q. All right. You said those other three that Mr. Redd has introduced took the form of cooperative efforts with the state officials; is that correct? They were [53] prepared with State water officials; is that correct?

A. Yes.

Q. Yes. Has the Forest Service in the State of New Mexico such a cooperative program underway with the State water officials?

A. In my inquiries with our Regional Officer personnel, they haven't informed me that they have made contact with the State of New Mexico.

Q. But is there such a cooperative program underway?

A. Yes.

Q. Has the Forest Service ever sent, to your knowledge, such a letter that you have identified to the State water officials of those three states, to the State Engineers of New Mexico?

A. Not to my knowledge.

Q. In fact, are you aware whether the inventory which was handed you in respect to the Gila National Forest

was made, at least in part, in response to the filing of this lawsuit, or at least submitted by your attorney to myself as attorney for the State of New Mexico, in connection with this pending lawsuit and quite apart from any cooperative efforts you may have in being with the State Engineers?

A. I had heard that, yes.

Q. All right. So this one differs somewhat from those other [54] three, that it is not the product of a cooperative state/federal effort, something that was turned over to an attorney in connection with the pending lawsuit to adjudicate water rights?

A. I don't think the inventory differs a bit.

Q. I mean the submission differs?

A. That might be.

Q. Now, let's look into what exactly the inventory is. These letters you have identified at Mr. Redd's request, including the letter from Mr. Redd to myself, all use the phrase essentially that the inventory represents existing and foreseeable consumptive uses of the fourth service on land reserve from the public domain. Those are correct statements, are they not? I'm reading now from the one sent to the Washington State Department of Water Resources?

A. Yes, those are correct statements.

Q. That's a correct statement? You had told me earlier, hadn't you, that you, your office, and the Forest Supervisors, include in this classification of Forest Service uses for forest land uses made not only by Forest Service personnel themselves and by the public—general public using the forest land, but also by permittees and leasees of Forest Service land?

A. In some instances.

[55] Q. Well, now, it—you are including both your own uses, public uses, and permittee uses, and you're including, as you say here, existing and foreseeable uses. What category of possible uses is omitted from these inventories?

A. I don't know at this point.

Q. In other words, when the inventory was made, each of these inventories—I am talking particularly of the one

for the Gila Forest—it was intended to be a full, comprehensive survey of present—that is, existing, and all foreseeable Forest Service uses which would be claimed by the United States Forest Service, both for its own use, its own administrative operation, uses by the general public of the forest land, and uses by permittees and leasees? Both for the present and the future? That's correct, isn't?

A. Mr. Bloom, I don't like to belabor a point, but there is one point that does bother me, because there are—we do issue special-use permits, which involve people who carry water, for example, off the national forest. And in our permits, we do not claim to give them any right to the water, nor do we claim the water itself.

Q. You're talking there about, for instance, where a community ditch or private irrigation heads on forest, but it's used by non-forest people?

[56] A. Right.

Q. When I talk about permittees and leasees, I'm talking about people who are using water on forest lands?

A. Yes.

Q. For National Forest purposes, such as recreation, et cetera. All right.

THE COURT: Well, I don't know if that's a National Forest purpose or not.

THE WITNESS: Yes.

BY MR. BLOOM:

Q. As a matter of fact, in this inventory which I'm going to offer in evidence, a very considerable portion of the claim is for stock water purposes?

THE COURT: By permittees?

MR. BLOOM: Yes. The witness has already told me there is no administrative stock raised in the forest.

THE COURT: My only question about your question is that I don't think you should expect the witness to alter the meaning of the last paragraph of Mr. Redd's letter to you.

MR. BLOOM: I don't want him to alter it. I just want to find out what the earlier paragraph means.

THE COURT: He says as to future users. It's not to be construed as a claim of the United States, nor [57] is it—that it is the current estimate and subject to revision.

MR. BLOOM: Yes, I understand. And the witness told me earlier on cross examination that, as I recall, Your Honor, these are subject to constant revision and year by year or every few years.

THE COURT: The form of your question would have permitted answers that would have been contrary to that.

MR. BLOOM: I would like to withdraw that question.

BY MR. BLOOM:

Q. I'm not asking you to give any legal opinion on what the purpose or the effect of that inventory is, just asking you if, as a matter of fact, when it's made, the people who make it are required to and do, to the best of their ability, consistent with federal law, and your manual of watershed management, truthfully and comprehensively set down every water use they can fit within those criterias, whether they're made or to be made by the Forest Service itself, by it leasee or permittee or by the general public using the forest land, including both those then existing and those foreseeable?

A. I certainly hope so.

Q. Yes. That's the purpose of it?

A. Right.

[58] Q. Right. So the only defect—leaving aside my legal effect, as a factual matter, the only thing that might be omitted is that your people might have failed to think of something, either to find one that is presently existing that should have been included or to think up one that five years later or ten years later or twenty years later you would discover somebody wanted to use?

A. Those would be the primary omissions.

Q. Okay. As far as you know, the inventory that I have shown you, the printout for the Gila National Forest which I submitted to you, includes the Mimbres Watershed, as far as you know; that is made on the same basis, isn't it?

A. As far as I know.

Q. You don't know whether it includes any of these in-stream fishery promulgations and aesthetic purposes, do you?

A. I'm not positive on that point.

Q. I would move at this time the admission of the inventory.

THE COURT: You'd better have it marked.

MR. BLOOM: Yes, sir. I'm sorry, I thought we had had it marked earlier. I believe the witness has identified it as the Forest Service Water Quantity Report for the Gila National Forest. I offer it in evidence at this time.

[59] THE COURT: Any objection, Mr. Redd?

MR. REDD: No.

THE COURT: It will be admitted.

MR. BLOOM: I have no further questions.

THE COURT: Do you have some further questions?

MR. REDD: No further questions.

(WHEREUPON, State's Exhibits A and B were admitted into the record.)

(WHEREUPON, a five-minute recess was held.)

THE COURT: Your next witness, Mr. Redd?

MR. REDD: Mr. Norman Ritchey.

NORMAN RITCHEY

Called as a witness herein, after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. REDD:

Q. Would you please state your name, address, and present occupation and employment?

A. I'm Norman Ritchey. I'm working for the Gila National Forest in Silver City. I'm in charge of the Soil and Water Management Program on the Forest directly under the Forest Supervisor.

Q. And how long have you worked in this present job?

A. I have been on the Gila in that particular job for [60] three years now.

Q. Could you relate your educational background?

A. I have a bachelor's degree in Forest Management from the University of Idaho in 1961. I have a master's degree in Watershed Management from the Colorado State University in 1964. I have advanced work in Hydrology at Arizona State University, but no degree in it.

Q. Now, how many years have you worked in the preparation of inventories of water needs, present and future water needs?

A. Since 1968. I began this work on the Lincoln National Forest.

Q. Now, did you have any responsibility in the preparation of the computer printouts of the inventory of present and future water needs in the Gila National Forest?

A. Yes, this was my responsibility.

Q. And when did you first begin this work?

A. In late 1970.

Q. Now, could you relate how this inventory was prepared?

A. This inventory, we started off with a form which was eventually used by keypunch operators for the fillout in filling this in. We inventoried to the best of our abilities the present uses, and we tried to estimate foreseeable uses.

Q. And what did you base your estimate on for the foreseeable [61] uses?

A. Our best guess.

Q. Now, in making your best guess as to future uses, were you attempting to estimate what the uses would actually be, or what was the most that could conceivably be used in the exercise of valid forest purposes?

A. We fell short of that second objective. We wound up with a short-range foreseeable. We tried in a revision to make a long-range, but we cannot predict the future that close. This thing became so dynamic in the few years that I was working on it that it changed constantly.

Q. Now, the printout that was submitted to the Court, did this include the entire Gila Forest?

A. I haven't seen the printout. It was supplied—

THE COURT: I think the Reporter has it.

THE WITNESS: This printout that I have in my hand here is for the Mimbres Watershed only. It does not include the whole Gila Forest.

BY MR. REDD:

Q. This is the Mimbres Watershed only?

A. That's correct. This Mimbres Watershed is coded Number 25 in the start of this and the middle and the finish is Number 25.

Q. And there are no water uses inventoried in that that are [62] not part of the Mimbres Watershed; is that your testimony?

A. Not from my quick scanning here.

Q. Now, you state that there had been some updating made since that computer printout was originally made, is that correct?

A. That is true.

Q. And what was the nature of these changes that were made at that time?

A. Well, as we learned more and as we denoted errors in my original work—and there were a great number of them—

THE COURT: What would the nature of the errors be, omissions?

THE WITNESS: Omissions.

THE COURT: Omissions of yours that you weren't aware of?

THE WITNESS: That's true. Mostly that and additional uses which we were not aware of at the time we made the inventories, that the additional uses would be made.

THE COURT: You mean for future uses?

THE WITNESS: Both future and current. For example, a number of stock watering facilities were built.

THE COURT: That you hadn't been aware of?

[63] THE WITNESS: That's true.

BY MR. REDD:

Q. Now, you have mentioned stock watering here. In making your estimates, do you feel that the inventories

accurately reflect the future development that might be made with respect to stock watering?

A. No, I don't think so.

Q. And could you explain why this does not?

A. Well, for one thing, the—how much use is made out of a stock watering facility is nearly impossible to estimate. Again, our limit is our best guess.

Q. Why is it impossible to estimate this?

A. Well, a variable number of stock would use any one facility. It might be that one of the greatest use of stock watering facility is by wildlife, a tremendous use that cannot be inventoried. Another thing, the variable water levels that occur in a stock tank, and that greatly affects the evaporation rate from a stock tank. There are many more variables.

THE COURT: How big are these stock tanks?

THE WITNESS: They again vary in size from a tenth of a surface acre to some of them over half a surface acre. They almost—none of them are much over one or two acres in capacity.

[64] BY MR. REDD:

Q. Now, in speaking of stock tanks, do you mean a metal or masonry tank?

A. In inventory, a stock tank was an earth structure.

Q. An earth structure?

A. Right.

Q. And these are small, what would be known as check dams or ponds?

A. Small ponds.

Q. Yes. Now, does one of the variables that you would have a problem with in estimating future needs for stock watering, the number of installations for watering, the number of watering places that would be on the forest land?

A. Would you rephrase that?

Q. Well, now, at the present time, you have how many stock watering points or watering holes on the Mimbres Watershed in the forest?

A. I don't have the tally figure on that. The earth stock tanks, I recall, are about a hundred of them that are

there presently. There are additional developments, such as springs, rock dams, which we call artificial springs. And water catchments and wells and this sort of thing, so there is several hundred at least.

Q. Are there particular problems that arise if you do not [65] have sufficient watering points?

A. There certainly are. With the present number of stock, the only way they can utilize an allotment is to be well distributed over the allotment, and watering is the only way we can do this.

Q. What are the problems that arise if you don't have proper distribution?

A. The land is ruined through erosion. The flood runoff is greatly increased.

Q. In other words, the cattle congregate around the existing—

A. Right. We would have very poor storage of the land if we allowed this to continue.

Q. Then it would be desirable to have more stock watering points?

A. It's absolutely essential.

Q. And that would distribute the grazing more evenly?

A. That's true.

Q. What are other advantages that would come from this?

A. Well, it would help wildlife quite a bit. This in turn would help a very important aspect of recreation on the forest, and this is our hunting.

Q. Has there been an erosion problem with the Mimbres Watershed from the distribution of the stock watering points?

[66] A. This is one of our chief problems.

Q. What are the things that limit the number of stock watering points that are installed?

A. The practicality or potential for developing good water. We prefer having springs all over, but we don't, so we have to go to other alternatives. One of these is a stock tank, for example.

Q. Is water piped sometimes from one area to another?

A. Yes, it is.

Q. Do these things cost money?

A. They certainly do.

Q. Where does this money come from to develop these?

A. Appropriations through Congress.

Q. Do the appropriations you receive have a bearing on the amount of stock watering points you put in?

A. They certainly do. They have limited this thing greatly.

Q. Now, in making your estimation of the amount of water for stock watering, did you take into effect—did you take into consideration all of the possible points that could be installed, considering prudent range management?

A. We don't know where these points are. You have to go through a range analysis and a great deal of planning. There are no good range water development records available.

[67] Q. Then at the present time, would you say that this inventory is a practical and accurate prediction of the future needs for stock watering purposes on the Mimbres portion of the Gila Forest?

A. No, it is a primary estimate only.

Q. Now, I think another of the things that are—what are some of the other things that are shown for water in the Mimbres Watershed of the forest?

A. There are a variety of things. The National Forest, domestic water for its administrative sites and water for its horse pastures. There is a recreation development plan which needs to be revised. It is preliminary, but we did the best we could in estimating the future campground water needs.

Q. You mentioned wildlife. Are there any inventory included in this printout for future needs for water, exclusively for wildlife as opposed to livestock.

A. This is one of our chief omissions in this. We have got a lot more work to do here and it's going to take quite some time to get this together, wildlife geologists, and myself, others who can help us on this.

Q. What would be the difference in these watering points from those that are just for livestock?

A. Wildlife watering on the Mimbres would be up in the high rocky country. You don't have much livestock [68] getting up in there. And yet this is literally the last

refuge for our deer and elk and smaller game. And I think we can include fisheries in this. These fish are a rare and endangered species. The Gila trout depend upon stable stream flow and water and so on.

Q. Is that Gila trout which you mentioned as being a rare and endangered species, is it found within the watershed of the Gila Forest?

A. Yes, sir, it is.

Q. Any other part of the country?

A. Just within the Gila Forest, to the best of our knowledge.

Q. Is there any particular place that this Gila trout is found?

A. In the upper MacKnight Creek, which is a tributary of the Mimbres River.

Q. Now, was a figure shown in this inventory for future needs for the Gila trout?

A. There was, but the figure is too small, as we recently found out in talking with our fisheries.

Q. What was this figure based on at the time, if you know?

A. It was the minimum stream flow that would be needed in order to develop fish stream improvement structures. In other words, the pools which the fish can survive in.

Q. Do you know at the present time what amount of water is [69] needed for the protection and the promulgation of Gila trout in the MacKnight Creek area?

A. No, it's going to take additional time to survey this.

Q. And are these studies being made at the present time?

A. No, we plan to in the future.

Q. What's the limitations on making these studies?

A. I don't quite get the meaning of the question.

Q. Well, you stated that it was necessary to make further studies, and you stated that these studies were not being made at this time. Plans, I should say. Why not?

A. Limited manpower.

Q. Limited manpower?

A. Just myself and one wildlife biologist, who is brand-new in the forest.

Q. Now, is fishing for the public permitted in the area where the Gila trout is found?

A. That is closed to fishing now.

Q. That's because of the Gila trout being a rare and endangered species?

A. That's true.

Q. Are there other streams that are live streams within the Mimbres Watershed that are open to the public for fishing?

A. The upper Mimbres River—when I say "upper," because the—in normal years, the Mimbres is dry for a stretch [70] through the Gila National Forest, but the upper watershed has a fishery potential in it. Another place that is small, but gets some fishers is Iron Creek, which is a tributary of Gallinas Creek and tributary of the Mimbres River. And that is all we have.

Q. Are these fished extensively by the general public?

A. Yes, they are.

Q. And is there any cooperation between the State and the Forest Service on the fishing of these areas?

A. Yes, there is.

Q. And what does this consist of?

A. Generally, the fish improvement structures are small dams of this nature. They have helped us with the funding; we have provided the manpower and have done the work. They also stock these streams for us.

Q. And do they issue fishing licenses for these?

A. That's the prerogative of the State to do this. They issue the fishing licenses and regulate the fishermen.

Q. Now is any figure shown in your printout for water to maintain these fishing streams?

A. Yes. This is an underestimate, as we know now.

Q. You state that it is an underestimate at the present time?

A. Yes.

Q. And can you explain how this came about, that you [71] realized that it is now an underestimate?

A. Based on what we needed to develop the stream for a fishery, the very minimum flow, and this would involve the actual building the structures in the streams to create pools.

Q. Now, does the size of the stream in any way limit the amount of fishing that is available?

A. It certainly does.

Q. And you state that at the present time these figures are inadequate?

A. Yes.

Q. Could you at this time come up with a figure that would be adequate for these streams within the very near future for future foreseeable uses?

A. I do not know until we develop and perfect the survey method for in-stream flow requirements.

Q. In other words, you don't even have the method at the present time?

A. No, I don't.

Q. Now, Mr. Ritchey, some mention has been made here of a structure or proposed structure by the name of Noonday Lake. Could you tell the Court what Noonday Lake is, or what it is proposed to be?

A. Noonday Canyon is a tributary of the Mimbres River. It is a canyon which flows through the village of San [72] Lorenzo. There is in these inventories a proposal for a fishing lake on Noonday Canyon. This stems from a recreation development proposal by the three C's in the thirties which was carried into recreation management plans made in the forties, which was further developed by the New Mexico Fish and Game Department in the fifties. And the proposal is now involved in the Bureau of Reclamation Proposal on the Mimbres project. This is where it's developed at today. It originated from a three-C project that would have been built, except that the three C's were disbanded in 1941 at the start of World War II.

Q. Was a figure shown in your inventory for a projected—for the needs for water for Noonday Lake?

A. Yes, there was. But that figure is preliminary. It was a guess that I made on the data that I had available at the time.

Q. Now, what are some of the things that would control the amount of water that would be used in Noonday Lake?

A. Well, the actual consumptive use would be evaporation from the lake surface and possibly that evaporation

would be greatly reduced because of the location of the lake, down in a deep canyon. It only gets the full effect of the sunlight in there, oh, just a limited part of the day. It's shaded quite a bit. That would greatly [73] reduce evaporation loss, which is possibly an error in that estimated figure I have.

Q. Now, are the plans—

THE COURT: Would you say that you overestimated the use there, you think?

THE WITNESS: I could have, yes.

BY MR. REDD:

Q. Now, are the plans on Noonday Lake sufficiently advanced that you know the exact size of the structure that will be built there?

A. No, it would depend now on the Bureau of Reclamation's designs, and they have two alternatives, two dam sites, in other words. And I do not know at this time in what state the development—that this is in in the Bureau's records.

Q. When this was proposed as a CCC project, was any planning data to the point of saying what size of project it would be, what size of a dam—

A. I have been trying to find the old CCC records, but I cannot.

Q. So you don't know whether they did or not?

A. I do not know.

Q. Would the size of the structure have a direct bearing upon the amount of water that is consumed by this project?

[74] A. That's true, it would.

Q. How about the amount of rainfall that you get in Noonday Canyon; would that have a bearing on it?

A. That's always considered in the design. The evaporation loss is estimated. We actually have a gross evaporation loss. And then we subtract the precipitation from that. However, the precipitation is naturally very variable.

Q. Do you have a map with you that shows the general area of the Mimbres Watershed?

A. I do.

Q. Could you produce it at this time, please?

MR. REDD: Your Honor, this map is being—I would like to have it placed on the board here for him to identify points and to illustrate the general location of these things. This is a U.S.G.S. Topographic Map, official map that I am offering, and I would like to have it solely for the purpose of illustrating this information at this time.

THE COURT: Are you suggesting it doesn't need to go in the record?

MR. REDD: I don't think it's really necessary. It could go in if the Court desires to have it in.

THE COURT: The reason for my question is, I just wondered how he can get it in the typed record [75] without some point of reference?

THE WITNESS: This could be redrafted on a smaller scale.

THE COURT: That's not necessary. The scale isn't going to cause any problem. It's just a question of whether it would—do you have copies of it or anything like that?

MR. REDD: We can have copies made for the record, Your Honor, and submit this with the original.

THE COURT: I think if he is going to refer to points, we ought to have some reference in the record.

MR. REDD: Very well. We will—I would like to have this identified. I would like to have this marked as U.S. Exhibit Number 5.

BY MR. REDD:

Q. Mr. Ritchey, on this map that has been marked as Exhibit 5, there are some product blue lines that have been traced along certain streams. What does that indicate?

A. In our opinion, the permanent waters in the Mimbres Watershed on the National Forest.

Q. Now, in your inventory, did you include any needs for these areas that are marked to indicate permanent flow for fish and for other purposes?

[76] A. Those with the fishery potential we put in the minimum flow, and again, this underestimate of two cubic feet per second. That included the upper Mimbres River, the upper MacKnight Creek, and Iron Creek. Now, the

others are very important stock watering in the Mimbres Drainage, in which the stock drink directly out of the stream.

Q. And those others that are shown are not streams that you indicated need for fisheries, is that right?

A. We do not think they have a potential for fishery development, because—mainly because they're just too small.

Q. Now, perhaps with a pen or something, you could indicate where Noonday Canyon is on this map?

A. Noonday is not shown in blue.

Q. Maybe you could put "A" in the area of Noonday Canyon?

A. So the village of San Lorenzo is here, and this is Noonday Canyon.

THE COURT: Is it still down here? Does it say so?

THE WITNESS: Yes.

BY MR. REDD:

Q. Could you indicate on this map where the Noonday Lake would be located?

A. Right about this location right here, very close to the forest boundary.

[77] THE COURT: And where you put the "A"?

THE WITNESS: Right.

BY MR. REDD:

Q. Now, does surface flow normally run from Noonday Lake into the Mimbres River?

A. No.

Q. Where does that water go?

A. Most of it is either evaporated from the channel or goes into the alluvial, the soil material.

Q. Is there any way that we could accurately measure the amount of water that runs from Noonday Canyon into the Mimbres River?

A. No way that I know of. We could put a stream gauge at the dam site. That would only be the water going past the site.

THE COURT: And as I understand that, most of that does not get down to the main stream?

THE WITNESS: No.

THE COURT: On the surface?

THE WITNESS: Except during flood season. There is some that goes down through San Lorenzo during flood season and causes quite a bit of damage.

THE COURT: And some goes down underground, I assume?

THE WITNESS: Yes. A great deal is also evaporated [78] from the surface as the stream fans out and comes out of the mountains there.

BY MR. REDD:

Q. Now, the confluence of MacKnight Creek and the Rio Mimbres, is that somewhere near the town of San Lorenzo?

A. That's about approximately ten miles upstream. MacKnight Creek comes on in.

Q. I beg your pardon, I mean Noonday Canyon?

A. Noonday is right below San Lorenzo.

Q. You mentioned there was some flood damage occasionally from Noonday Canyon in the village of San Lorenzo; is that correct?

A. That's correct.

Q. Now, has the village of San Lorenzo taken any position with respect to a structure on Noonday Canyon?

A. Yes. One of the citizens has written a letter to a local resource conservation development committee, asking for possible help in some sort of floodwater retardation on this stream.

Q. Now, would the proposed Noonday Canyon Lake provide some flood protection for the village of San Lorenzo?

A. It would provide a great deal.

MR. BLOOM: It's just a legal matter. I take it Mr. Redd is arguing that flood control is an authorized purpose of the National Forest, and I [79] just wondered if he had made that point at the pre-trial conference, or if it has ever been specified that the United States is claiming flood control structures. Because if it's not, I don't see the relevance of the question.

MR. REDD: I think this goes back, Mr. Bloom, to the statement in the policy that was brought out from our previous witness, that the National Forest uses would be controlled by the local area and the local conditions, including the need for use and water and the use for water and so forth. And this is one of the considerations that would be going into the development of this project, that it would help the people downstream. Although this is not a valid Forest purpose, but this could be for the justification of such project.

THE COURT: All right. Proceed on that basis.

BY MR. REDD:

Q. Now, did your project—I think you have already testified that your inventory did include some water for Noonday Lake, is that correct?

A. That is correct.

Q. Did you state your opinion as to whether or not this figure was an accurate figure as to what will actually be used there, if Noonday Lake is constructed?

[80] A. I pointed out that that figure was preliminary and that the final figure would rest with the Bureau of Reclamation's design.

Q. Now, does your inventory show water for any other proposed lake, for fishing and recreation?

THE COURT: May I interrupt just a second? The Bureau of Reclamation, what's their interest? Is there some irrigation at San Lorenzo?

THE WITNESS: It originally started with irrigation in the Mimbres project, which included a large dam on the Mimbres.

THE COURT: Well, is there a Reclamation Park and Irrigation District in that area?

THE WITNESS: There may be, but I do not know for a fact.

THE COURT: For example, I don't think that the Bureau of Reclamation builds dams, either for wildlife, fish, or flood control. I may be wrong.

MR. REDD: Your Honor, perhaps I could state here that although the primary purpose of the Bureau of Reclamation, originally at least, was to build irrigation projects.

THE COURT: Multiple?

MR. REDD: Many other things often enter into these, and many other projects in this day and age [81] are only a small part of the Reclamation's projects. There are people that have the expertise and people that plan and develop these projects.

THE COURT: I thought they still had to have a major reclamation purpose. I might be wrong.

MR. REDD: I think that the figures will show that today that there is more water going into municipal use and commercial use than there is into reclamation.

THE COURT: All right. Go ahead.

BY MR. REDD:

Q. Now, did your inventory show any need for any other reservoirs in the Mimbres Watershed of the National Forest?

A. There were other reservoirs proposed in those. The Forest included two on Gallinas Creek, the upper and lower, and one called Cooney on the upper Mimbres.

Q. Is this listed specifically under those reservoir names?

A. Yes.

Q. Now, at the present time, would you say that those figures that are shown in there are accurate estimates and predictions of the amount of water that would be used by these projects if built?

A. I have no figure for those, because I have nothing to [82] base them on.

Q. Then you made no estimate as to the amount of water that would be used?

A. No estimate, other than the fact that the project proposal existed, and they did emanate from old CCC proposals.

Q. Now, what is your judgment with respect to these projects, if built? Would they be valid projects in the prudent management of the National Forest resources?

A. They certainly would be valid. The fisheries—recreation is one of the great shortages on the Mimbres. There is very little fishery opportunity there.

Q. Could you identify the upper and lower Gallinas Reservoir, with the letters "B" and "C"?

A. Upper Gallinas is "B" and lower Gallinas is "C".

Q. Now, I notice that these are shown on segments of streams which do not show perennial flow, is that correct?

A. That's true.

Q. And would it be correct to say that the only flow that you would get there would be after heavy, during and after heavy precipitation?

A. Yes.

Q. Now, generally speaking, is there surface flow from those streams where the upper and lower Gallinas [83] Reservoirs are proposed that runs into the Mimbres River?

A. Only floodwaters; there is no permanent waters that I know of.

Q. And to your knowledge, is it presently possible to estimate the amount of water that flows from those streams into the Mimbres River?

A. It would be very hard to do?

Q. And you state that no water was shown for these reservoirs?

A. No, because of the preliminary nature of the data. No indication of a possible dam height or even of the material the dam would be built out of.

Q. Has serious consideration been given to the building of these projects?

A. Yes, they are in the Bureau of Reclamation proposals.

Q. And you state that these first date back to the CCC days?

A. Yes. For these, it is hearsay. It was based on the people that I obtained my data from.

Q. Now, you mentioned another reservoir by the name of Cooney Reservoir?

A. Yes.

Q. Could you identify with the letter "D" where Cooney Reservoir would be?

A. That's on the upper Mimbres.

[84] Q. And this is in the area where perennial stream flow is shown, is that correct?

A. Yes, we show it, but because of the nature of the stream channel, while the surface flow goes all the way some years, it retreats back up above.

Q. When was this project first proposed, to the best of your knowledge?

A. This again was a CCC project or proposal, and then in the fifties, was picked up by the New Mexico Department of Game and Fish for consideration, and is now in the Bureau of Reclamation's proposal.

Q. You state that this was picked up by the Department of Game—State Department of Game and Fish? Did they advocate the building of this structure?

A. Yes, they had a set of plans and designs, but again, I can't show a figure for this.

Q. You did not show any figure for that?

A. No.

Q. To the best of your judgment, would the—would the construction and operation of this reservoir as a fishing and recreation reservoir be a valid use within the prudent management of the forest resources in the Mimbres Watershed?

A. Yes, it would.

Q. Are there any other reservoirs that there are proposals [85] for to your knowledge that were not adequately inventoried as to future uses in your inventory of the Mimbres Watershed for future needs?

A. These were the primary ones, other than the large Bureau proposal, and I have no data on that other than future campground needs.

Q. Now, with respect to these future campground needs, are there variables with respect to that?

A. Quite a bit. It would depend upon the planning of the campgrounds as to how much water is needed, how many wells, and where they could be located.

Q. What are some of the things that water would be used for in a campground site such as this?

A. Primarily domestic. Drinking water primarily, but also for sanitation facilities.

Q. Now, would there be a substantial difference in the amount of water for this camp or a relatively smaller camp or if it were a larger camp?

A. I don't think so. I think the pressure on the fishing lake would determine this. The campgrounds may have six units, but a particular unit, it may have a great many more people using it.

Q. What about the type of sanitation facilities around which are needed to go in there?

A. Our regulations indicate that we have to provide some [86] type of sanitary facility. Were it a larger project that would attract a great many people, that would involve something like a water flowing system for the water—or waste material, and to treat it.

Q. Would this be required for a smaller campground?

A. Possibly not, but this depends on the regulations that exist at the time that this is constructed.

Q. These could change and change the amount of water that is needed there?

A. Could change drastically in the last few years.

Q. In view of this, would you say that your figure that you put in your computer printout for a recreation site at that area would be accurate?

A. It could be very inaccurate.

Q. Would it be possible at this time to give an accurate estimate as to the amount of water that would be needed for the campgrounds at that site?

A. No, because this would depend upon the design.

Q. Now, can you state that a figure was given for this particular project at the lower Mimbres site for the amount of water that would be used there?

A. Yes. I have since learned that this would be incorrect, because of the type of sanitation facilities which we would be required to have.

Q. Now, this figure that was again there was only for the [87] campgrounds, is that correct?

A. That's true.

Q. And no figure was given for a reservoir and evaporation from the reservoir?

A. No figure for the large reservoir, because it was not a National Forest proposal. The smaller lakes were National Forest proposals.

Q. Now, if that lake were built there, would it be on National Forest land?

A. Yes, it would.

Q. And would it provide forest-type recreation facilities?

A. Yes, it would.

Q. What would that consist of, those forest-type recreation facilities?

A. It would be a boat ramp up to four campgrounds. I do not know the figure for the camping units. Possible concession there and administrative facilities.

THE COURT: This is at what location?

THE WITNESS: This is on the main Mimbres River at MacKnight Canyon.

BY MR. REDD:

Q. Could you mark that with a letter "E"? Now, Mr. Ritchey, do you know of any other instances where your computer printouts would not be accurate today, because of the inability to accurately predict the future needs for [88] water?

A. Well, one of them would have been—this is somewhat of a serious area—water needed for road construction and road maintenance, and each year, the water trailer that we have uses quite a bit of water in the Mimbres Basin to prepare roads for grading, and several of them are oil. Water was used for this, and this would—this should go into an update.

Q. This is not shown in the present—

A. It is in the present update, the most recent one made, but this is an example of an error. Now, the sanitation facilities for Mimbres Reservoir for foreseeable use, I will have to some how come up with an estimate on how much water would be needed for a layout of that size, and get this into foreseeable use. It would be very hard to come up with anything accurate on this.

Q. Is there any timber of loggable and lumbering quality in the Mimbres Watershed?

A. There is, but it is very limited. I doubt that very little logging will ever occur there again, because the timber that is there is more valuable for recreation, for

aesthetic. However, there are some places in MacKnight Creek that have been logged and may again be logged. But there is a very, very limited area.

Q. And that could depend upon numerous variabilities as to [89] whether or not this logging would be done; is that correct?

A. Yes, it would.

Q. Do you show any needs—any figures for future needs for logging purposes in your inventory?

A. No, I did not.

Q. And that was because you assumed that logging probably would not be done?

A. I assumed it would not be too important, but then again I could be wrong. We now know that, for example, that Kennecott may go back to the use of converter poles instead of using natural gas to extract oxygen out of molds and vat copper. If that's the case, logging may resume in this area. I just learned that two weeks ago.

(WHEREUPON, a short recess was held.)

BY MR. REDD:

Q. One more question, Your Honor. Now, Mr. Ritchey, with this inventory that was originally prepared or as updated, was it ever intended as a complete estimate of all of the possible valid forest uses of water within the Mimbres Watershed?

A. No, it was not. This thing was very complex, and this was the result of our first go-round.

Q. What was it intended as?

[90] A. To perfect survey method, for one thing, and to build on it from there. The original intention was to come up with a document which would help the State Engineer and the Forest Service plan future water needs.

Q. And was there an intent to submit that to the State?

A. No, not this one.

Q. And when was there an intent to submit it?

A. At such a time when we felt we had good, accurate data.

MR. REDD: I have no further questions.

THE COURT: Well, I know that you wouldn't be willing to close the door on yourself, would you; after you had built on it, would you still try to keep it open for future changes?

THE WITNESS: We certainly would, because when I think of what's happened in the last five years, if I projected this into the future, it's tremendous. It's dynamic and I guess I get older and wiser too.

MR. BLOOM: Your Honor, before I begin, I want to express a little surprise that notwithstanding all the discussion on the direct examination of this witness, but that inventory has not been identified or introduced through the testimony of this witness, or that quite apart from the testimony of this witness, it has not been heretofore [91] been made known or supplied to the other parties in the case. The Court will remember, I think, that the matter of this inventory was raised at the first pre-trial conference.

THE COURT: Some discussion on it?

MR. BLOOM: Yes, and I asked at that time if the Court didn't agree that it would be useful and be formulating their position and pursuing possible compromises that this inventory be made available to the State and pursuant—it was my clear understanding that the Court agreed it would appropriate, and I am a little surprised, in view of the status of the matter, that we could have gone so far as a commission and finished a revised inventory on that.

THE COURT: If I understand the situation correctly, Mr. Bloom, it's not material, in the sense that they don't want to be bound by this one or that one, whatever it shows?

MR. BLOOM: I just want to point it out that not only is it indefinite, but it is invisible.

EXAMINATION

BY MR. BLOOM:

Q. Now, Mr. Ritchey, I believe that you said that in this recent revision of your earlier inventory for the [92] Mimbres Watershed, you added three reservoirs; is that right?

A. Three fishing lakes, something like that. They were already always in there.

Q. You are telling me now that there are consumptive uses set out for four reservoirs or lakes?

A. For the one we had best data for, but I could not pin down the others yet. The proposal existed and, as a matter of accurate and complete reporting, they were put in there.

Q. Right. They were in the forest, but no consumptive use was associated with them?

A. That's correct.

Q. All right. And you are unable to guess what a consumptive guess would be for them now, if any?

A. I have not seen figures. As I said, that would be on the design.

Q. Has Congress authorized the Forest Service to build any of those four reservoirs?

A. Not the Forest Service, no.

Q. Has it authorized any agencies of the United States to construct these four reservoirs?

A. Not to my knowledge, the construction, but they certainly are authorized to plan them.

Q. Yes. Well, of course, there are thousands of things [93] being planned. None of these four has been authorized or had a single thin dime appropriated for its construction to any federal agency, has it?

A. That's correct.

Q. And in fact, you mentioned that Noonday and at least two of these other three new ones that you have come up—

A. They're not new.

Q. Well, the ones you talked about with Mr. Redd in addition to Noonday, come out of some sort of Bureau of Reclamation report, is that right?

A. No. These were from data on file on the Gila Forest or from the people I had talked with in trying to substantiate the data.

Q. All right. Has any agency of government made a formal report finding favorability and feasibility of constructing Noonday, Cooney, and the two on Gallinas Creek?

A. No, they are in the process of this.

Q. So you don't know the outcome of those studies?

A. No.

THE COURT: There are feasibility studies being made?

THE WITNESS: Yes. We had word about a year ago that they planned to go into Noonday and Cooney and possibly the others.

[94] BY MR. BLOOM:

Q. Do you know whether those are feasibility or reconnaissance?

A. Core drilling is definitely feasibility.

Q. By the Bureau of Reclamation?

A. Yes.

Q. I understand you to say these—

A. No, you said Forest Service study.

Q. No, I said Bureau of Reclamation Studies?

A. I'm sorry, they are Bureau of Reclamation proposals now.

Q. Which are under study and some were reconnaissance or feasibility level investigations, but not authorized?

A. That's correct.

Q. Are you aware that all water uses, all consumptive uses of water under Reclamation projects per se aren't 1902 Reclamation Law as amended are in fact to require strict compliance with state law in acquisition of water rights, and no Bureau of Reclamation in the history of the western states has ever been built since 1902, the doctrine of water rights?

MR. REDD: Your Honor, I think he is asking for a conclusion of law from this witness, and I'm not sure that the conclusion of law he is asking for is accurately stated.

THE COURT: I sustain the objection. You can ask [95] him whether the Bureau of Reclamation—do you know whether the Bureau of Reclamation has ever built a project since 1902 without having acquired water rights under state law?

THE WITNESS: No, I'm not familiar with that.

BY MR. BLOOM:

Q. We can save that for legal argument. They can not, as a matter of law. Now, so you have simply thrown this in as potential uses because the Bureau of Reclamation is thinking about them or studying them?

A. I do not know what agreement the Bureau of Reclamation has with the New Mexico Department of Game and Fish or who would build them.

Q. That brings another point up. You have mentioned that any fishing lakes or any reservoirs in these dams, if any of them be built in the future, might be operated under some sort of contract arrangement of the State Game and Fish Department; is that correct?

A. Some agreement.

Q. In fact, you have a couple of lakes on forest land in the Gila National Forest under such agreement, don't you?

A. That is correct.

Q. You have Lake Roberts and you have Snow Lake, don't you?

A. That is correct.

[96] Q. Isn't it true that both of those operate entirely on water rights acquired and transferred under state law rather than under the doctrine?

A. I have no knowledge of how the New Mexico Game and Fish got the water rights.

Q. You know they did get water rights?

A. I understand they did.

Q. Water rights adjudicated in this District Court on State decree to private?

A. In the Gila River Drainage.

Q. That's right. As a matter of fact, the Forest Service even went to some lengths to obtain title to certain adjudicated water rights to private individuals in the Gila by Judge Norman Hodges for the purpose of partially filling Snow Lake, didn't they?

A. Those were cultivation special-use permits.

Q. They were adjudicated rights in the state court, weren't they, Mr. Ritchey?

A. Yes, they were.

Q. As a matter of fact, what hapened when Mr. McCalley sold them to the Pacific Western Company and Pacific Western tried to transfer them over to the Forest, and they said we will protest you and stop you unless you give us part of those water rights to fill Snow Lake?

A. I wasn't here then.

[97] Q. Yes, but you know what happened?

A. I know something like that went on.

Q. Those were all rights under state law and adjudicated in the state court, not the United States?

A. I have never traced the history.

Q. You know, don't you, that the United States was part of the Gila River adjudication, don't you?

A. I have studied it.

Q. I didn't ask you what you had studied. Do you know that as a fact, or don't you?

A. I can't answer it.

Q. All right. Now, you have told me that Snow Lake and Lake Roberts is two fishing lakes over in the same National Forest on the other side of the drainage of water stored under state water rights. Do you know of any lake on National Forest land, any fishing lakes on National Forest land anywhere in the State of New Mexico that has any water in them for fishing? Pools, any sort of pool for recreation or fishing, which are not based on state-acquired water rights?

A. I can not think of any in this state.

Q. All right.

A. Although there may be some.

Q. Then why would you assume that four reservoirs which you suggested the Bureau of Reclamation or somebody else [98] or the State Game and Fish Department might build and operate in the Mimbres Drainage would require water under the reservation doctrine, when the very similar fishing reservoirs you have on the Gila Forest and the other side of the drainage, you tell us you don't know of any fishing lakes in the state on any forest land that operates except under state water rights? Why do you make the contrary assumption as to these four possible future fishing pools on the Mimbres Drainage?

A. I made no assumptions. This I reported, data which I found in the files and from talking with individuals on the forest.

Q. Did I understand that these things you put in your inventory and your revised inventory are not based on reservation doctrine rights, but state-acquired water right?

A. I made no assumption either way.

Q. Either way, I see. So it is quite possible then that much or possibly all of what you listed as present and/or future uses in the Mimbres Drainage in the Gila National Forest might be now, and may be in the future, satisfied under state doctrine, under state water law, by acquisition and transfer of water rights?

A. I don't think I can know this.

Q. You don't know, but that could be the case?

[99] A. I can't answer that.

Q. All right. You know, of course, from the experience of Snow Lake and Lake Roberts, that's quite possible, obviously, to acquire and transfer water rights under state law in order to get such fishing reservoirs in national forests?

A. That is true.

Q. That's true? Now, this business that you went into in length with Mr. Redd about endangered Gila trout and wildlife watering and cattle watering in the stream and minimum flows for fishing, in-stream fishing flow, I would like to go into that a little bit. Possibly I missed something in the course of your answers, but it sounded to me like you were saying you were making estimates of consumptive uses of water for these purposes? Was that correct, in your inventory?

A. Which one of those are you talking about?

Q. Any of them, all of them.

A. Well, fishing in the stream, there has to be a minimum flow to support the fisheries.

Q. I asked you about consumptive uses of water. The fish are not, except metabolically perhaps, in minute quantity.

A. There is a consumptive use and that is the trees which shade the stream and which provide the cool—the lower [100] temperature which provides trout habitat.

Q. We're talking about, now, vegetation, watering of wildlife in the stream itself, without any man-made work and minimum flows necessary for the Gila trout and fishing the endangered Gila trout and other fish. Now, let me see if I understand what the nature of your inclusion of the inventory was. Are you saying that a certain amount of water has to be reserved against somebody else for minimum flow in the stream? Or are you just describing a natural situation, that if somebody takes the stream away, there is not water, the land and fish will die? Is that all you're saying?

A. As far as if the water is taken away, we have a tragedy, no fish, no trees, nothing.

Q. But in fact, you're upstream from everybody else on the Mimbres River, aren't you?

A. In this case, yes.

Q. So who is going to take it away from you?

A. Look at the map on the upper Mimbres. Two pieces of private land right there that could be developed, subdivided.

THE COURT: When you say "right there," place where you are pointing to.

THE WITNESS: Very close to the Cooney dam site, there are two parcels of private land there.

[101] BY MR. BLOOM:

Q. Do you know who owns them?

A. A Mr. David Gerrow owns all or part of them.

Q. Well, what you are saying then as to one particular man who has no existing uses, is that correct? He has no present uses in that area on that land?

A. Possibly he has his cattle there. He has his cabin there.

Q. He may have a small, domestic well?

A. Yes.

Q. He could have; you don't know that he has them?

A. No.

Q. All right. But except for this one man who could possibly develop more than, you know, he has now, you're upstream from everybody on the Mimbres River?

A. In this case, yes.

Q. All right. So what is the utility or purpose of including these minimum flows in the stream that you believe are required for Gila trout and watering deer and fishermen and riparian vegetation; except with this one man, you're upstream from everybody; aren't you really just saying that you would like this Court to arrange that there would always be enough winter snow and summer rain to keep your stream live? And do you really think the Court can do that?

[102] A. No, not at all.

THE COURT: Did you include in your inventory an amount of water used for items or—

THE WITNESS: Where consumptive use was involved, we did.

THE COURT: And where would this consumptive use be?

THE WITNESS: Well, permanent waters in the stream are very important watering for cattle, and the consumptive use here is tied in with the total cattle use and the grazing allotment, and this work that Mr. Martinez did.

THE COURT: The fact of the matter is, livestock used up in the upper regions, don't you have control of that? I mean, you're the one to determine whether you are going to let any livestock in there which are going to consume any of this water, which is going to lower this stream where you won't get the benefits of it? Or am I wrong?

THE WITNESS: It would take a lot of livestock to lower those streams that much. But the fact is that where those streams are, a great number of cattle normally don't go in there. However, when the stream is running in the lower region where there is greater grazing potential, they use those.

[103] THE COURT: The fact is, in answer to Mr. Bloom's question as far as the fishing and the fish promulgation—

THE WITNESS: Yes.

THE COURT: —and this kind of thing, there is no consumptive use of water to preserve the—

THE WITNESS: No consumptive use, other than recognizing the fact that the water has got to be there to have any fish.

THE COURT: So then you set that up as a use for yourself; is that what you have done in this inventory?

THE WITNESS: We did not list it as a consumptive use, but listed it as a need.

THE COURT: Of the amount of water that you estimate is in that stream, the full flow of the stream at that point?

THE WITNESS: Again, my estimate was an underestimate. We started off with two cubic feet per second on these streams, and realized that it should be more. It should be approximately what there is on the streams in the upper regions, because we could have the whole stream flow without damaging other people.

MR. BLOOM: Your Honor, the State would be glad [104] to stipulate. I don't see the utility of the Forest People solemnly putting in what seems to be prayers for water as to their inventory.

THE COURT: If I understand it correctly, and I'm not sure I do, what you are doing is questioning their competition, if you please. And I take it that this will—may point out something here. Of course, I didn't recognize that this will be subject to inquiry if we get to quantification.

MR. BLOOM: Yes, sir. Well, it doesn't seem to me that this is a quantifiable thing. There are certainly no man-made works.

THE COURT: I think you got the answer you were seeking.

MR. BLOOM: All right.

THE COURT: I think it would be necessary, in connection with the inventory, to be able to relate to one another.

MR. BLOOM: I didn't want this including the inventory. We think the principle of the inventory is fine, but we don't agree with the particulars.

THE COURT: I understand.

MR. BLOOM: I wanted the witness to see if he agreed, if they had a forest and a lot of [105] upstream,

and if they had a right for minimum upstream from the farmer and the city, it seems to me somewhat removed from my calculations of consumptive uses.

BY MR. BLOOM:

Q. You said something about the floodwaters on reaching Noonday Canyon that might be trapped by a possibility of some future construction of Noonday Lake by somebody. You said that the normal base flows, if I understand you, would not in the normal case reach the Mimbres River, but occasionally floodwaters do?

A. Yes, sir.

Q. You would agree, of course, wouldn't you, that when the base flows percolate underground, leaving aside flood flows, that those base flows going underground are, of course, hydrologically related to the Mimbres River?

A. No, I do not, because I don't know the hydrology of that site.

Q. The surface stream is a tributary to the Mimbres?

A. That's right.

Q. Do you have any reason to think that the ground water goes off in some peculiar direction and doesn't run—percolate parallel with the stream itself?

A. I have never seen a ground water hydrology report of that area.

[106] Q. Okay. So you know no reason why they should not in fact do what water ordinarily would do? When there is a dry stretch, they percolate underground and come up later, or merge downstream with the—in water table conditions or on the surface in the main stream?

A. No, I would not say that, because there are many things in the geology that can fool a person. Many times the ground water divide and the surface water divide is different.

Q. Do you know anything here, any geological formation, that would in fact separate ground waters in the immediate underflow of the Noonday Canyon, Noonday Creek, from the ground—from the water tributary to the Mimbres River system?

A. I have never studied the area.

Q. So you don't know of anything that would separate them?

A. No, that is true.

Q. You don't know?

A. I can't answer either way, because I have not studied this.

Q. All right. Who told you to revise your inventory?

A. I did.

Q. You did it completely on your own initiative?

A. Certainly.

Q. Did you ever talk to any attorney for the United States [107] of America before you did that, in relation to this case?

A. No. I believe Don was unaware that we were doing this.

Q. In fact, you have a copy of your revised inventory with you?

A. Yes, I do.

Q. I think you said you didn't assign any consumptive use valid to these three reservoirs, either in your revised or first inventory, in addition to Noonday?

A. That's right, I did not.

Q. How long had the lands in the Mimbres Watershed been in the Gila Forest?

A. The reservation date on part of it is 1899.

Q. So we have something like sixty or seventy years of history of administration by the Forest Service of all the forest land in the Mimbres Drainage?

A. That's correct.

Q. Is it your view that the records of the Forest Service accurately show in general the water uses that had been made during that period of time in the Mimbres Drainage on the forest?

A. No.

Q. Do you think any large water uses have been omitted?

A. I do not know.

Q. You think some people slipped up there and put in large [108] reservoirs that you did not know about, or your predecessors didn't know about?

A. I don't know of any.

Q. As a matter of fact, you know, don't you, that the only uses that had been made in the last seventy years in the Mimbres Drainage in the forest have been preponderantly for stock water uses, as your first inventory shows; isn't that correct?

A. Preponderantly, but some of these ponds emanate from possibly mining operations and were used by grazing permittees.

Q. As a matter of fact, as we computed, about 72.25 acre feet a year out of 84 or 85, which your first inventory shows as total of present consumption uses in the Mimbres Drainage is in fact accounted for by stock watering use on your first inventory?

A. This is possibly true.

Q. Yes. Don't you think that that seventy years of records in which seven-eighths was made by permittees for stock watering purposes gives you a pretty good historical picture of water use in the Mimbres Drainage in the Gila National Forest?

A. No.

Q. Why not?

A. The records are sparse, not really good. As a matter [109] of fact, a great number of cattle grazed that area much more than right now. At the time the forest was proclaimed, there probably could have been more use at the time the forest was proclaimed. We have added stock water ponds and there is evaporation loss. In our records, we found that possibly we had records of ninety percent of the stock water ponds, and the other ten percent came when I interviewed people. And actually, this survey helped our other records, to get those up to date.

Q. But you didn't make or cause to be made a survey of water use? And interview the people who use the, for example, total of 84 acre feet annual consumptive use for all purposes at the time of your inventory, first inventory?

A. That is true, yes.

Q. And you did in fact make a comprehensive check of your matter and investigation of—

A. It was the best job I could do.

Q. At that time?

A. At that time.

Q. All right. Do you have any reason today to think that you omitted any significant historical use, any use that existed at the time that you made that first inventory for the Mimbres Drainage?

A. Yes, I do.

[110] Q. What did you omit?

A. Wildlife waters.

Q. I'm talking about consumptive uses of water, Mr. Ritchey. Now, what man-made works for consumptive use exists in the Mimbres Drainage for the purpose of watering wildlife?

A. A great number of them.

Q. Who has built stock ponds for watering wildlife in your forests?

A. The Forest Service.

Q. Aren't they included in your inventory?

A. They were included in the original inventory, and we found additional ones.

Q. How many did you find?

A. There was one that I know of.

Q. Well, how big was it?

A. About a tenth of an acre foot.

Q. Out of all these hundreds of items, you found only one omission, and it was a tenth of one acre foot?

A. This is more recently. The first revision I made, I had almost—I don't know the exact count. There was almost between fifty and seventy separate revisions.

Q. You counted the revisions every time you had to revise something or make any kind of change at all, or what do you call a revision? Do you have to run it through a [111] computer every time for it to be a revision?

A. That's right.

Q. You must be doing one of these every two weeks.

A. I have a number now that I need to put in. I just thought of these the last few days and came across the record the last few days.

Q. You use the term "indirect short-range foreseeable" and "Long-range foreseeable." What do you mean by those terms? Are they your terms or somebody else's?

A. They're my terms and solely mine. I had the responsibility for that. This pertains to the grazing allotment, possibly should have done this on recreation, but our data is so sparse right now that if a range is improved such as it is, it could have additional cattle on it.

Q. You mean if it's irrigated or what?

A. No, if the waterings are put in and this sort of thing.

Q. What you are saying is that if you manage your grazing land differently than you do, then you will have a different number of cattle?

A. If we could encourage the permittee to do a good job.

Q. Is that one of the criteria of your Forest Administration, is to encourage the permittee to get more and more cattle grazing in the forest?

A. No. We want to encourage the permittees to do the [112] proper job. It's to his benefit and to ours.

Q. I'm a little surprised. Up north in New Mexico, we hear that the Forest Service has been criticized for cutting back the number of cattle. I'm a little surprised to hear that you're encouraging the contrary.

A. Each piece of land has a potential for improving, and if that land improves to where it will support additional cattle, we have really no choice but to put additional on. If it can be done without a retarding of this improved range.

Q. That's what you mean by long-range foreseeable?

A. That's short-range. If an allotment—if we could ever get the money ideally to water an allotment, that's where we go in the long-range. These terms are original.

Q. What's the difference between the improved condition and the ideal or perfect condition?

A. Actual range condition of the allotment is all.

Q. What would be involved in reaching the ideal range condition?

A. I don't know what you mean by "ideal range condition." That's what I am talking about, is that a range has potential for improvement, and if permittees achieve this potential. Now, in the long range for good cattle

distribution over an allotment, we would need an ideal setup of watering. That would only come in the long [113] range, because our funding has been so sparse.

Q. I see. So your short range is improvement made by the permittee. Your long range is being followed up by further improvements made by you if you get the money?

A. That's the way I can see from the purpose of this inventory.

Q. That's a conjecture following a supposition, but if they do, the permittees do the maximum they can, then if you get the money, then those things, those two things could lead to increased water uses for stock watering?

A. They could go hand in hand. And possibly those figures should be combined.

Q. That's in effect the utopian condition, that the permittee will do everything he should do, and the Congress could do everything they should do, and you would be able to use more water?

A. It isn't as grandiose as it sounds. It's really practical to do the job we should be doing.

Q. All right. I think you told Mr. Redd, Mr. Ritchey, that you didn't mean this inventory to be a firm estimate. You meant it to be your best guess, is that a proper—is that a proper paraphrase of what you said?

A. That's right.

Q. What's the difference in your mind between the best guess you can make right now and the best estimate you [114] could make right now?

A. One and the same.

Q. That's right. If they're one and the same, what do you mean by the distinction then, I take it, is that if your Forest is to put down your water requirements, including your foreseeable right now, then what you did in your inventory as you revised it is a continuing statement of your best estimate. But if we give you more time and don't put a limit on it, you will come up with other things as time moves on? Is that a fair paraphrase?

A. I don't think so.

Q. Well, will you tell me what the difference is then between the best guess you could make now and the best estimate? You have told me the terms mean the same thing.

A. A guess-timate and an estimate are certainly the same. This estimate is an educated guess; it certainly is that. But we learn things with time, and we get better data with time.

Q. If some court of competent jurisdiction were to lean over and tell you, Mr. R. chey, "You have half an hour to give me your best estimate on your oath of your water requirements, present and future foreseeable, future and existing, for the Mimbres Watershed in the Gila Drainage," you would have to give them your most [115] updated inventory, wouldn't you? Isn't that the best that you have right now to document the total of your existing and your reasonably foreseeable requirements?

A. Our latest revision is our best estimate now.

Q. Right. And a year ago, whatever inventory you had at that stage was your best estimate?

A. That is correct.

Q. All right. Are you aware whether the—let me ask you this. What studies have you made to determine whether the Mimbres River contains any unappropriated waters at the present time?

A. We're not in that stage of this inventory. We're in the preliminary stage.

Q. You have made an inventory that was sent to Mr. Redd and Mr. Bloom, but you have not finished the inventory, is that correct?

A. Eventually there would be notification to the states and maybe this would all be in balance, I rather presume.

Q. But you have made no present study as to availability of unappropriated waters in the Mimbres?

A. No.

Q. Do I infer correctly that you have made no attempt to calculate the effect of increasing depletions of the National Forest through the construction of the reservoirs you have talked about, or through increased [116] depletions through stock watering or increases in stream

uses, or any of these other things on the existing water use, economy downstream from you on the Mimbres River System?

A. I have made no study.

Q. Do you intend to make one?

A. I do not know.

Q. I call your attention to 2541.03—policy, which has already been introduced into evidence from the Watershed Manual of the Forest Service, quote: "Water required for National Forest System purposes will be used efficiently; in water scarce areas, it will be used frugally. Forest Service responsibility for meeting the resource needs of the people, including water, dictates a policy of caution and reasonableness in our deliberate use of water, to improve the use and productivity of the National Forest System. Determining such water needs in areas of short supply, careful consideration will be given to the needs of non-National Forest users who are dependent on water for their livelihood." You're telling me that, notwithstanding this policy statement in your manual, that you made something like sixty revisions of inventory, but have not yet given a thought to the effect of these proposed uses on the short supply? That's already affecting the people in [117] the Mimbres System.

A. That's not the purpose of reporting in this inventory at this time.

Q. You recognize that this is a post directive from the Forest Service, generally governing your water uses in the forest, don't you?

A. I have read that, yes.

Q. You're aware, therefore, that you would have to comply with this under the requirements of your employment in formulating final plans for this, or the Forest Supervisor would, in determining what could be used and what could not?

A. We most certainly would, and to my knowledge, we have never, ever entered with a person's water rights in this manner.

Q. Therefore, if I understand these inventories, in addition to being preliminary, in your view, and your best estimate, they are not based, as you told me earlier, on any assumptions that this water will be available to

you only through exercise of reservation right; but in fact, they are neutral and could be—just as well be satisfied like these reservoirs through acquisition and transfer of state water rights, state recognized water rights, like Roberts Lake? And further, that any uses made by the forest, as contemplated in these inventories [118] preliminary inventories, with this provision of your manual, which will require that you give very serious care to the downstream people before you use water; isn't that true?

A. That's quite a bit to swallow.

Q. You agree that before you finalize your inventory, it will have to be scaled down to allow for the policy directives which I have read to you from the manual, which requires if you take great care not to infringe on the uses of other people outside and downstream from the forest, whether those are senior or junior to the National Forest in legal terms?

A. This may be, but again, I'm only in the reporting stage right now.

Q. Right. So what you are saying, you're in the stage in which you survey all possibilities, no matter how remote, put everything in at this stage and then scale it down later to reflect necessary policy directives and availability and state of water rate under state law and other factors?

A. Well, I don't know how we're going to work this in the future, but these are in the inventory because they're on the record.

Q. Then, if I understand the inventory, it's really a preliminary estimate of the maximum that could be claimed [119] by the Forest Service, since it stands to be reduced by these other factors we talked about, like reservation water rights? Since some of these are bound to be supplied by state-acquired rights, some of them don't involve—

MR. GRANT: I object on the grounds that question has been asked and answered.

THE COURT: I am inclined to sustain it.

BY MR. BLOOM:

Q. All right. You state that Noonday Lake has been under study for forty years?

A. It has been proposed possibly for all that time, but I'm quite certain that it would have been built by now had the three C's continued to operate.

THE COURT: I'm a little bit intrigued, Mr. Ritchey, with a discussion that these various proposals of reservoirs, which are, as I understand it, now probably in the hand of the Reclamation Service, if built, would utilize Forest Service water and would be beneficial to the operation of the forest. I don't understand that that would be the basis upon which the Reclamation Service would build them. Am I correct in that?

THE WITNESS: The Bureau's outlook and functions have changed in the last few years.

[120] THE COURT: I was told that a few minutes ago, but you still say that the Reclamation Bureau would consider building this because it would benefit the forest?

THE WITNESS: No, I don't know who would build them, but the Reclamation Bureau is planning, and they have got into it because of the overall Mimbres Project.

THE COURT: All right. Do they have a broader interest in the Mimbres?

THE WITNESS: Yes. A larger Mimbres dam than has been proposed.

THE COURT: That's not on the forms?

THE WITNESS: Yes, it is.

THE COURT: Oh, it is?

THE WITNESS: Yes.

MR. BLOOM: They haven't claimed that one, Your Honor; that's the only difference.

THE WITNESS: I believe that was Number E on the map.

THE COURT: Do I understand that E is the lower Mimbres site, you called it? That's the way I wrote it down anyhow.

THE WITNESS: Yes, it located on the Mimbres River at MacKnight Canyon.

[121] THE COURT: And that is the site that is being studied by the Reclamation Bureau? But did not involve any Forest Service water?

THE WITNESS: That is true. It is not a Forest Service proposal. There was nothing on record until it was proposed.

THE COURT: How does it differ from these others, as far as Forest Service water?

THE WITNESS: These were old proposals on record.

THE COURT: But not the Forest Service?

THE WITNESS: Yes, Forest Service. The three C's operated under the Forest Service, and these proposals came from this. The three C's throughout the country built fishing lakes and built the recreation facilities around them.

THE COURT: And if I understand you correctly, the Reclamation Service interest in the lower Mimbres site is for additional purposes, I assume?

THE WITNESS: It was a multi-purpose dam.

THE COURT: What would be the additional purposes?

THE WITNESS: Fishing, boating, and allied water sports, this sort of thing. I doubt if the feasibility of it was thought of then.

THE COURT: And you say that because of their interest in that, they are studying these others, [122] which would have a benefit through the Forest Service?

THE WITNESS: Well, it's not as a benefit to the Forest Service as much as it is for the recreation and opportunities for the community.

THE COURT: I couldn't rephrase the ultimate question that you were asked by Mr. Redd as to whether or not, in your opinion, how the construction of these reservoirs would carry out purposes of the withdrawn water from the Forest Service, and I believe your answer was yes?

THE WITNESS: Yes, that's correct.

THE COURT: Is there any difference between that and the site upon the Site E?

THE WITNESS: They all would.

THE COURT: But you don't include that one?

THE WITNESS: No, because there was nothing on record that I could tie to that that had ever been in the Forest Service proposal.

THE COURT: Now, we're talking about future needs. This is what these items are, and do I understand you to say that the only future needs now that you have considered are the needs which have been talked about some time in the past?

THE WITNESS: Yes, that's the only one I considered [123] in this one.

THE COURT: Don't you think there might be some that nobody has ever thought of yet?

THE WITNESS: A great deal, a great deal.

THE COURT: Including Site E?

THE WITNESS: That's right.

THE COURT: But you didn't put in any Forest Service reserved water for Site E?

THE WITNESS: No.

THE COURT: And didn't contemplate that you would?

THE WITNESS: I hadn't thought of it in quite that way. I thought of things that were strictly tied to Forest Service proposals, Forest Service operations, and the broadening of Forest Service recreational opportunities towards the community.

THE COURT: Go ahead, Mr. Bloom.

BY MR. BLOOM:

Q. If you needed them for the forest, you needed them forty years ago, why haven't they been built?

A. Money.

Q. Has the forest—

A. We hardly have enough money to pick up the beer cans.

Q. What studies have you had made of the feasibility of these?

A. The Forest Service has made no study, unless the CCC did [124] it, and the record is lost.

Q. In other words, there are things that you think are needful, but you never got around to study whether or not they were feasible?

A. That is correct; however, the New Mexico Game and Fish did.

Q. They operate under state law?

A. Right.

MR. BLOOM: That's all.

THE COURT: Mr. Redd?

MR. REDD: No further questions.

THE COURT: That's all. Do you have anything further?

MR. REDD: No further witnesses, Your Honor.

(WHEREUPON, this Hearing was concluded.)

[UNITED STATES EXHIBIT 4]

July 21, 1972

AIR MAIL

Paul R. Bloom, Esquire
Special Assistant Attorney General
State of New Mexico
Bataan Memorial Building
Sante Fe, New Mexico 87501

Dear Mr. Bloom:

Re: Mimbres Valley Irrigation Co. v. Tony Salopeck,
et al., Civil No. 6326, Six Judicial District Court,
County of Luna, State of New Mexico

Some time ago you requested documentary evidence of the various reservation and withdrawal orders placing lands in the Rio Mimbres Watershed in the National Forest as alleged in our answer in the above-captioned action. Enclosed are copies of the Presidential Proclamation dated March 2, 1899, General Field Order No. 6, Headquarters, District of the Missouri, dated July 26, 1866, ordering the establishment of Ft. Bayard, Executive Order dated April 19, 1869, confirming the establishment of Ft. Bayard (together with supporting documents), Executive Order dated July 14, 1906, Executive Order dated May 23, 1907, Executive Order dated July 23, 1908, Executive Order dated November 13, 1908, Executive Order dated June 22, 1910, Executive Order dated October 22, 1910, Executive Order dated April 24, 1911, a letter dated January 2, 1941, from the Commissioner of Public Buildings transferring the major portion of Ft. Bayard Military Reservation to the Department of Agriculture and a copy of the deed dated July 1, 1966, conveying the hospital site at Ft. Bayard to the State of New Mexico.

The following Proclamations and Executive Orders withdrawing lands from the public domain for forest purposes within the Rio Mimbres Watershed are not included because they are printed in the Statutes at Large

and readily available. The Presidential Proclamation dated July 21, 1905, may be found at 34 Stat. 3123. The Presidential Proclamation dated February 6, 1907, may be found at 34 Stat. 3274. The Presidential Proclamation dated June 18, 1908 may be found at 35 Stat. 2190. The Presidential Proclamation dated May 9, 1910 may be found at 36 Stat. 2694.

Also enclosed are copies of computer printouts showing water uses and projected water uses for the Forest Service and of other Government uses from the National Forest in the Ft. Bayard Reservation. The projected water use figure is the current estimate used by the Forest Service and is subject to revision. It is not intended to be construed as Claim of the United States total future uses under its reserved water right in this Watershed.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: Donald W. Redd
Attorney

Enclosures

CC: Irwin S. Moise, Esquire
Sutin, Thayer and Browne
800 Simms Building
Post Office Box 1945
Albuquerque, New Mexico 87103

[UNNUMBERED UNITED STATES EXHIBIT]
[*supra*, pp. 63-64]

EXTRACTS FROM FOREST SERVICE MANUAL AS REVISED THROUGH OCTOBER 1965, AMENDMENT NO. 137

TITLE 2500—WATERSHED MANAGEMENT

-d. Employ the proper engineering design to make certain that water-use facilities are safe and efficient.

4. *District Rangers.* The District Ranger may be authorized to:

a. Provide for efficient and economical use of water on National Forest System lands in accordance with Forest Service policies and, where applicable, in accordance with State laws.

b. Inform the Forest Supervisor of National Forest System water-use requirements as needs develop or become apparent.

2541.1—*Withdrawal of Lands and Reservation-of-Water Principle.* The reservation of water is effective as of the date of the withdrawal of lands from the public domain. For the various withdrawn lands these are:

1. *National Forest Lands Withdrawn From Public Domain.* The date of the Presidential proclamation establishing a forest reserve or National Forest.

2. *National Grasslands and Land Utilization Projects.* (For former public domain lands only.) The date the lands were withdrawn from the public domain for the purpose of the Land Utilization Project.

3. *Taylor Grazing Lands Added to National Forest (Act of July 9, 1962).* The date of withdrawal of the lands from the public domain for National Forest System purposes.

4. *Former Indian Reservation Lands.* The rights and effective date are dependent on what the United States

actually acquired in each case. Advice from the attorney-in-charge or regional attorney of the Office of the General Counsel should be obtained in each case.

Within the National Forest System where the reservation principle applies, water rights that have been acquired under the procedures prescribed by State law prior to the establishment of the reservation are good as against the United States, and are compensable if taken by the United States. Under such conditions, reservation of water for National Forest System purposes is subordinate to water rights established prior to the date of withdrawal. It is essential that locations of diversions and amounts and dates of appropriations for such other rights be known by forest officers before States are notified of National Forest needs. In some instances waters may have been fully appropriated before the date of withdrawal. In such cases National Forest System needs may be met through the purchase of water rights or by application of measures which will increase the usable supply of water.

Water rights in some areas have been perfected or may in the future be perfected by Federal court decree, and in a few instances they may be affected by inter-State compact or treaty. Perfected rights must be considered valid unless reversed or invalidated by a court of competent jurisdiction. Such valid water rights must be taken into account when use of water under the reservation principle is contemplated.

In some instances, States have recognized beneficial-use dates in the name of the United States for National Forest System water use that are prior to the date of withdrawal. An example would be where the State has issued a water right to the United States in recognition of the fact that the water had been put to beneficial use by stockmen for stock watering before the withdrawal of the lands for National Forest purposes. In such cases where water rights can be obtained under State law that are paramount to those secured under the reservation principle, the water rights should be perfected under State law.

2541.11—Notification to States of Water Uses. For a considerable time it was the policy of the Forest Service to make filings with appropriate State agencies in accordance with procedures established by State laws for waters needed in connection with the development and administration of the National Forest System. In this way the Forest Service endeavored to inform State officials and others as to National Forest System water requirements. Although formal filings will no longer be made for waters available under the reservation principle, the Forest Service will continue to inform the States of its existing and foreseeable water uses. This will be done for both surface and subsurface waters. Filings previously made in accordance with procedures of State law and water rights subsequently issued should be preserved for record purposes.

Information will be provided in the form of a periodic notification, preferably by watersheds, which will list all National Forest and National Grassland water uses, existing and foreseeable. Where practicable, watershed areas so reported will coincide with State water districts or State subdivisions for water-right administration. Full consideration should be given to State problems that may result in connection with procedural changes.

2541.12—Reportable and Nonreportable Uses. For report purposes, distinction must be made between nonreportable water use which is utilized naturally as contracted to reportable water use which is artificially or deliberately utilized to improve the use and productivity of the National Forest System.

Examples of nonreportable uses include, but are not limited to:

1. Evaporation from any water body or stream.
2. Seepage losses from any water body or stream.
3. Consumptive use of water falling on the land and utilized onsite for trees, grass, or shrub growth.
4. Consumption created by the water-retarding effect of road construction, erosion control, or other activities.

Examples of reportable uses and needs include, but are not limited to:

1. Developments to improve the availability of water for wildlife or domestic livestock.
2. Diversions for irrigation of pastures, nurseries, or meadows.
3. Administrative-site water supplies.
4. Developed water for recreation area uses.
5. Developed water for logging camps.
6. Water required for developed special uses, such as resorts, summer homes, and cow camps.
7. Initial filling of conservation pools designed for permanent recreation, fish, or wildlife use in public or privately financed water storage reservoirs.
8. Initial filling of impoundments developed specifically for recreation, fish, and wildlife habitat.
9. Flows necessary for fish habitat protection, such as minimum streamflow or lake-level requirements to maintain fish life, including fish ladders and regulated-flow spawning channels, when diversions are anticipated which would result in less than minimum acceptable flows.
10. Minimum flows required for maintenance of streamflows and lake levels for recreation, scenic, or esthetic purposes, when diversions are proposed which would result in less than minimum acceptable flows or levels.

2541.13—Reporting Water Reserved From Development. Careful attention will be given to determining water requirements and future water requirements for management of National Forest System lands when conducting multiple use surveys and preparing reports on water resource development projects. Following completion and approval of multiple use survey reports, notification will be made to the State as to the water reserved for National Forest purposes which would not be available for issuance of State water rights to the water development agency.

2541.14—Analysis of Water Needs. Decisions to initiate or expand reportable water use for National Forest Sys-

tem purposes will be based on thorough analysis by the Forest Service of the various factors involved. Developments will be designed and operated in a manner which permits the most efficient use of water. Provision for maximum return flows should be considered. Other water saving methods, such as the use of monomolecular films to retard evaporation from water surfaces, must also be considered.

In drainages where water has been completely appropriated under State law subsequent to the reservation date, use of water for National Forest System purposes will be expanded only where careful evaluation of all water uses and needs fully justifies such expansion. Where non-National Forest use of water has been established under State law, the values and benefits of proposed National Forest System uses and activities dependent upon that particular water supply will be fully analyzed before a decision is made to increase National Forest System water use. The effect of the proposed National Forest System water use on present non-National Forest users who are dependent upon water for their livelihood will be fully considered to ensure that any unnecessary disruption of their existing water use is avoided.

In such cases a written analysis of the problems and relative needs involved, with recommendations, will be made by the Forest Supervisor. The analysis will be reviewed and approved by the Regional Forester before the water is used for National Forest System purposes and the State notified (FSM 2541.04).

2541.15—Form of Notification. No standard form is required for notification to States of water use. Procedures for notification will be worked out by the Regions on a State-by-State basis. The State water agency should be requested to participate in the development of such procedures. Where more than one Region deals with a single State, the Regional Foresters concerned will jointly develop the notification procedures with the State. A listing of existing and foreseeable National Forest System water uses and needs by watersheds, with an annual updating,

is preferred because of its simplicity. Attempt should be made to get State acceptance of this notification.

2541.02—Objective. The objective of the Forest Service is to obtain sufficient quantity of water, in accordance with legal authority, to provide for the development, use, and management of National Forest System resources with due consideration for the needs of other water users.

2541.03—Policy. Water necessary for the development, use, and management of resources of the National Forest System will be used in accordance with the reservation principle where applicable. In cases where that principle is applicable, the proper State water agency will be notified of current and foreseeable future National Forest System water requirements in a manner to be developed with each State, on a State by State basis. Where the principle is not applicable, water rights will be obtained in accordance with State laws. Water rights should be purchased if essential to Forest Service activities and not otherwise available.

The Forest Service, in all matters related to water use and water rights, will endeavor to work cooperatively with the States. Such cooperation will recognize the State's authority and responsibilities for allocation of waters within the State and the need for the State to be informed as to uses of water on the National Forests.

Water required for National Forest System purposes will be used efficiently; in water-scarce areas, it will be used frugally. Forest Service responsibility for meeting the resource needs of the people, including water, dictates a policy of caution and reasonableness in our deliberate use of water to improve the use and productivity of the National Forest System. In determining such water needs in areas of short supply, careful consideration will be given to the needs of non-National Forest users who are dependent on water for their livelihood. This will require a Forest Service analysis of the importance of water for National Forest System and non-National Forest System purposes.

2541.04—Responsibility

1. Chief. The Chief shall:

a. Develop policies, programs, and procedures for obtaining sufficient water for the development, use and management of National Forest System resources.

b. Develop and maintain cooperative relationships with national agencies and organizations concerned with development and utilization of waters on and from National Forest System lands.

c. Review and approve Forest Service participation in water rights adjudication proceedings (FSM 2541.7).

2. Regional Foresters. The Regional Forester shall:

a. Notify the States of the National Forest System water use, existing and foreseeable, as applicable under the reservation principle (FSM 2541.1).

b. File application for water rights in accordance with State law, for water required for use on the National Forest System lands not reserved from the public domain (FSM 2541.2).

c. Purchase water rights as may be necessary.

d. Review and approve water needs analyses submitted by the Forest Supervisor in support of water use notifications where water is fully appropriated (FSM 2541.13).

e. Provide technical guidance, assistance, and training, including engineering design of water use facilities, as required to meet program objectives.

f. Develop and maintain cooperative relationships with State and regional agencies and organizations and regional offices of national agencies and organizations concerned with development and utilization of waters on and from National Forest System lands.

g. Establish the rate of progress and priorities by watersheds to complete the initial inventories and records called for in FSM 2541.3, .31, .32, and .33 by not later than June 30, 1970.

3. *Forest Supervisors.* The Forest Supervisor may be authorized to:

a. Prepare and recommend to the Regional Forester a timetable of planned progress and priorities by watersheds for completing the initial inventories and records called for in FSM 2541.3-.33. The rate of progress and priorities should be such as to complete the job in advance of anticipated adjudication proceeding which may be initiated by States or other agencies.

b. Develop and maintain an inventory of National Forest System water uses (FSM 2541.3).

c. Prepare water-use notifications (FSM 2541.1), water-right applications (FSM 2541.2), analyses of water needs (FSM 2541.13).

LAW OFFICES OF
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September 17, 1974

Mr. Donald W. Redd
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Mr. Richard A. Simms
Special Assistant Attorney
General
State Engineer Office
Bataan Memorial Building
Santa Fe, New Mexico 87501

RE: Mimbres Valley Irrigation Co. v. Salopek, et
al., Luna County Cause No. 6326

Gentlemen:

After many delays and false starts I have finally put together what I believe may serve as a framework for the Findings of Fact and Conclusions of Law to be filed in this case. I enclose them herewith.

I would point out that I have had some difficulty in reconciling descriptions of properties as well as descriptions of present uses of water.

Utilizing the Findings and Conclusions as prepared by Mr. Simms and sent me in his letter of May 1, I find that in his paragraphs 1 a to e there are a number of omissions from the lands described in the computer print out which was introduced in the case. Also, there are a

couple of deviations from the other proposed Findings submitted to me. These differences should be reconciled and agreed upon, if possible.

I have left blank the uses specified in Mr. Simms' request in paragraph No. 2, inasmuch as they likewise differ from those contained in the proposed Findings submitted in paragraph VIII submitted to me in the case. These uses should likewise be reconciled and agreed upon, and incorporated into the Findings. In the proposed Conclusion No. 8 submitted by Mr. Simms the date "1896" appears. I have incorporated this Conclusion as my Conclusion No. 7, but show the date as "1869." I believe the 1896 date is an error.

You will note that I have incorporated as Conclusion No. 9 the requested Conclusion No. 10 submitted by Mr. Simms on the assumption that it conforms to the understanding of the parties. I have no independent recollection of the matter.

As you will observe from my draft, I have concluded that I should adhere to my conclusion as to the law, as submitted in my letter dated January 17.

I would appreciate it if you would undertake to agree upon the descriptions and uses mentioned above and that they be inserted in the proper places and the instrument completed accordingly and returned to me for my signature and filing. If you have any additional questions, feel free to communicate them to me.

Very truly yours,

SUTIN, THAYER & BROWNE
A Professional Corporation

By /s/ Irwin S. Moise
IRWIN S. MOISE

[SEAL]

STATE OF NEW MEXICO
STATE ENGINEER OFFICE
Santa Fe

November 22, 1974

Hon. Irwin S. Moise
Sutin, Thayer & Browne
P.O. Box 1945
Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek et al.,
Luna County Cause No. 6326.

Dear Justice Moise:

A week ago Tuesday I met with representatives of the United States in an attempt to resolve the numerous differences in property and water use descriptions in the proposed Findings of Fact. I enclose herewith the result of that meeting—subject to final review by the United States, proposed Findings that the State of New Mexico and the United States have agreed upon in all particulars except one.

The only remaining area of dispute involves a mixed issue of law and fact which probably should have been but was not argued in Deming, namely whether the claim of a minimum flow at certain points in a river can be asserted as a federally reserved water right. The problem was not argued earlier because I was unaware that the claim was being made. I was remiss, I believe, in not noting that the claim was being asserted in the government computer printout, but the printout was not abstracted by either party until after the arguments.

When the technical abstracting was done with respect to the property descriptions and water uses, it was done in this office by the engineering staff. The result was that a minimum flow of 2 c.f.s. appears in the State's initial proposed Findings (at p. 4). In my brief review of their findings as to use and location I did not catch

the minimum flow, and consequently the proposed Findings and Conclusions left the office containing an item that should have been deleted. In any event, at our Tuesday meeting the United States had another, more recent computer printout which, it was said, more accurately described the facts as of the date of trial. However, the new printout included two more claims at different locations of 2 c.f.s. minimum flows, thus totaling 6 c.f.s. and bringing the matter to everyone's attention.

As a result the only remaining difference between the parties stems from the minimum flow claims. The enclosed Findings and Conclusions do not recite the claims as would, I'm sure, the United States' proposal. In all other respects we are in agreement. As to the remaining difference of opinion I respectfully request that the parties be permitted to argue the question by memorandum brief.

One other matter should be mentioned. The recent printout also made reference to item number 879, designated as the airport well and amounting to 2.01 acre-feet. This item is also left out of the Findings because it is not a reserved right, but rather a right appurtenant to acquired lands.

Sincerely,

RICHARD A. SIMMS
Special Assistant Attorney General

[Submitted to Special Master Nov. 22, 1974]

STATE'S FIRST PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
 - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all Sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
 - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28,

29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Sections 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29 and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., N.M.P.M.
2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		2.99	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Residential	7-21-1905
18 16S 9W	229		.03	Domestic Residential	7-21-1905
18 16S 9W	230		.03	Domestic Residential	7-21-1905
19 16S 9W	231		.01	Domestic Residential	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.16	Stockwater	7-21-1905
— 18S 9W	307		3.18	Stockwater	5-9-1910
— 14S 10W	500		6.46	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	536		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 10W	537		2.13	Stockwater	3-2-1899

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.70	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.82	Domestic Recreational	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.90	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
— 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
17 17S 14W	904		.10	Wildlife	6-18-1908
— 20S 15W	907		1.65	Stockwater	2-6-1907

3. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest 1-4 of Section 10; thence east to the west line or northeast 1-4 of southwest 1-4 of Section 10; thence south to the southwest corner of same; thence east along the south line of same and along south line of northwest 1-4 of southeast 1-4 of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast 1-4 of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and

12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

4. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
5. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.
6. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W.,

1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N. 28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence N.1°43' W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use. . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. When the Ft. Bayard Military reservation was discontinued and ceased to exist as a military reservation, whatever water rights which may have existed for military purposes and uses also ceased to exist.
6. In respect to the above-described lands transferred to the Department of Agriculture on January 2, 1941, to be administered as part of the Gila National Forest, the United States owns water rights for the requirements and purposes of the forest uses, with the priority date of January 2, 1941.
7. It has been stipulated that water rights appurtenant to the above-described lands transferred to the State of New Mexico on July 1, 1966, will be recognized and determined according to the constitution and laws of the State of New Mexico.
8. In respect to that portion of the Ft. Bayard military reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1896, for the requirements and purposes of the said cemetery.
9. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional

rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

10. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping, and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

Special Master

, 1974.

LAW OFFICES OF
SUTIN, THAYER & BROWNE
A PROFESSIONAL CORPORATION

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December 5, 1974

Mr. Richard A. Simms
Special Assistant Attorney General
Office of the State Engineer
Bataan Memorial Building
Santa Fe, New Mexico 87501

Mimbres Valley Irrigation Co. v. Salopek, et al.,
Luna County Cause No. 6326

Dear Mr. Simms:

Your letter of November 22 enclosing Findings of Fact and Conclusions of Law to be signed by me has been received. I have not signed the same because I was not clear as to whether or not the United States would communicate with me as to their position before I did so. Almost two weeks have passed and I have heard no word from them. However, I wanted to be sure that there was no reason why I should not go ahead and sign them. Accordingly, I would ask that I be advised by return mail in this regard.

Also, I note the item concerning the minimum flow claims and the request that both parties be permitted to file a brief concerning the same. This, of course, is agreeable and I would only inquire if these Findings and Conclusions should be retained until that can be accomplished. Just as a precaution that this not delay the matter indefinitely, I would request that I have the memo from both of you by January 1. If this is not agreeable, you may advise.

In the last paragraph of your letter you mentioned the airport well with a right to 2.01 acre feet and state that this has been omitted from the Findings. How do you propose to handle the omission?

Very truly yours,

/s/ Irwin S. Moise
IRWIN S. MOISE
Special Master

[Filed in State District Court Jan. 13, 1975]

OBJECTIONS OF UNITED STATES TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUBMITTED BY THE STATE OF NEW MEXICO
ON NOVEMBER 22, 1974.

The United States interposes the following objections, together with points and authorities in support of its objections, to the proposed findings of fact and conclusions of law submitted by the State of New Mexico on November 22, 1974.

I. *Minimum Streamflows.*

The United States objects to the exclusion of three items of minimum streamflows as shown in its computer printouts. The State is in error in its statement that there was no discussion of the minimum streamflow items listed in the computer printouts at the hearing in Deming on October 9, 1973. Mr. Norm Ritchey testified under oath that these minimum streamflows of 2 cubic feet per second each had been set by the forest officials for the maintenance of fish life in the streams in question. There was considerable evidence with respect to one of these streams that this streamflow was for the preservation of a variety of trout native to that area which is on the endangered species list.

* * *

II. *Airport Well.*

The United States objects to the failure of the proposed findings of fact to recognize the right of the United States to use 2.01 acre feet of water per year for forest purposes from the Airport Well. It is conceded that the right to use this water is not a reserved water right since this well is not on lands withdrawn from the public domain for forest purposes. The water, however, is used for valid forest purposes, i.e., domestic, administrative, and firefighting, the most critical of these uses being firefighting. Water from this well is used for mixing slurry which is loaded into the forest service firefighting planes.

This action was intended to be for the adjudication of all water rights of the United States within the Rio Mimbres watershed. No evidence was introduced with respect to this use because it had never been challenged until the proposed findings were prepared by the State of New Mexico. If additional evidence on this question is desired we will be happy to provide it.

The United States may acquire water rights by other means than reserving them along with public lands for a particular purpose or compliance [*sic*] with State law. *Dugan v. Rank*, 372 U.S. 609 (1963), *City of Fresno v. California, et al.*, 372 U.S. 627 (1963). The United States has made a valid appropriation of the waters from the Airport Well by putting them to beneficial use for forest purposes. Had we known that this use was to be contested, evidence would have been introduced at an earlier date. If evidence is desired at this time we can supply it.

III. *Conclusion of Law No. 11.*

The United States objects to proposed conclusion of law No. 11 which reads as follows:

That until the enactment of multiple use-sustained yield act on June 12, 1960 (74 Stat. 215, 16 U.S.C. 528) no act of Congress authorized the use of waters for substantial recreational reservoirs, winter sports facilities and other substantial works involved large consumptive uses.

This question has not been briefed or argued in this case. As Noted in part one of this memorandum, however, the Multiple Use Act was not a new authority for uses of National Forest lands and resources but was merely a reaffirmation of policy and practices that have been in existence and had been recognized and sanctioned by Congress from the time National Forests were originally established.

At the present time there are no substantial impoundments of waters within the Mimbres watershed for forest purposes. It is suggested that appropriate time to decide the issue with respect to substantial impoundments is when

the United States submits its list of future needs and requirements for water if any of these future needs involve "substantial" impoundments.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

By: James B. Grant
JAMES B. GRANT
Asst, U.S. Atty.

/s/ Donald W. Redd
DONALD W. REDD
Atty, Dept. of Justice
Washington, D.C. 20530

[Submitted to Special Master Jan. 31, 1975]

STATE'S MEMORANDUM BRIEF

In its Objections to Proposed Findings the United States remarked that it could not "understand New Mexico's objection to the minimum streamflows in question since they deprive no private user of any water. To the contrary, these minimum flows if maintained help to ensure a water supply for downstream users outside the National Forest boundaries." It should be noted initially, however, that a right to a minimum instream flow can be utilized in only one situation, namely where there is a junior upstream appropriator whose right could give way to the government's in times of shortage. If there is no upstream appropriator the so-called right to a minimum flow is purely fanciful, i.e., it would be legally insignificant in that it could be enforced only against God, who is neither a party to this adjudication nor amenable to service [*United States ex rel. Gerald Mayo v. Satan and His Staff*, 54 FRD 282 (W.D. Penn. 2971)]. The issue, consequently, is whether the United States should have the right to shut off an upstream appropriator on the basis of alleged water uses inimical to both the purposes for which the forests were created and to appropriation water law theory.*

According to the United States the question has already been answered:

In the case of *Arizona v. California*, § 73 U.S. 546 (1963), the Special Master in his report found that the National Forests in the lower Colorado River Basin were established for the following purposes: (1) the protection of watersheds and *the maintenance of natural flow in streams* below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) *protection and propation of wildlife*; and (5) *recreation for the general public*. (Master's Report, p.96 (1960), Emphasis added by United States, p. 3, Objections).

* The issue could arise in one other way, namely in the context of an application to change point of diversion.

One supposes that the Master's use of the phrase "*the maintenance of natural flow in streams*" indicates his belief that minimum instream flows are legitimate reserved water rights, but the emphasis is rather obviously misplaced. Without the emphasis provided by the United States the *Report* reads as follows: One purpose of the National Forests was "the protection of watersheds and the maintenance of natural flow in streams below the sheds. . . ." The phrase to emphasize, in our view, is "*below the sheds*;" in other words, the purpose described by the Master was that of managing the water sheds in order to ensure—to the extent humanly possible—an adequate and reliable supply of water for the downstream users. This purpose is accomplished, of course, by prudent watershed management, and not by the judicial recognition of an alleged water right which could not possibly help to provide water downstream. We must conclude consequently, that if the question of minimum instream flows was considered by Mr. Rifkind, it was his view that they should not, by a useless judicial act, be elevated to inconsequential possessory interests, but rather should be protected by prudent watershed management in order to ensure a reliable yield for the benefit of the downstream users.

The truth of the matter, of course, is that the question of whether the United States has a reserved right to minimum flows was not considered in *Arizona v. California*, just as it has not been considered as such in any reported opinion that we are aware of. Within the framework of appropriation law there have been analagous decisions holding that man-made diversions are required in order to appropriate public waters. [See, e.g., *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 493 P.2d 409 (1972); *Walsh v. Wallace*, 26 Nev. 299, 67 P.914 (1902)]. The question at hand, however, can be resolved only by determining whether reserved rights to minimum flows were within the purposes for which the national forests were established. It is New Mexico's view that until quite recently such "uses" were never remotely considered as water rights by either Congress or the forest administrators. On the contrary, as we shall point out, the govern-

ment's claims to minimum flows amount to a new wave of reserved right assertions—a second generation of reserved rights which would do little more than effect an apotheosis of the government's physical dominion over forest waters.

Initially it must be remembered that until *Pelton Dam* in 1955 the Winters doctrine was a limited exception to the government's deference to state water law. As noted in *California—Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164, 55 S.Ct. 725, 79 L.Ed 1356 (1935):

. . . following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . with the rights in each (state) to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.'

Before *Pelton Dam* the Winters doctrine was provincially Indian in application, having never been applied to any federal reservation of public lands except Indian reservations. A broader application of the doctrine was simply unexpected:

There was no hint that the doctrine might be applicable to other reservations or withdrawals of the public domain if any decision, writing or federal agency practice until 1955, when the Supreme Court decided what has come to be known as the 'Pelton Dam' case. . . (Trelease, Frank 4., *Federal-State Relations in Water Law*, National Water Commission Legal Study No. 5 (1971), p.105).

Prior to 1955, then, no one had recognized federally reserved water rights in national forests or any other federal enclave except Indian reservations. Accordingly, the United States treated its non-Indian lands differently insofar as water matters were concerned. Typically,

Congress authorized the appropriation of federal money in order to secure within the framework of state law the water rights necessary to the administration of other federal land reserves. (See, e.g. 16 U.S.C. § 526 (1964)). It was the policy of the Forest Service, as well, to comply with state law in the acquisition of water rights: "Rights to the use of water for National Forest purposes will be obtained in accordance with state law." [*Forest Service Manual* (1936)]. While there was no express indication that state law was to have been the only source of national forest water rights, the Agriculture Organic of Sept. 21, 1944, Ch. 412, Title II, § 3213 (58 Stat. 737, 16 U.S.C. § 526 (1964)), specifically authorized appropriation of funds "for the investigation and establishment of water rights, including the purchase thereof of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forest." [Cf., generally, Bradshaw, David S., "Water in the Woods: The reserved-Rights Doctrine and National Forest lands," 20 *Stan. L. Rev.* 1187 (1968)].

Without the post-Pelton reservation doctrine, then, it was the policy of the Forest Service to comply with New Mexico law in seeking to make appropriations of waters which at the time were thought to be in the public ownership of New Mexico's citizens. Indeed, as late as 1955 the United States Forest Service had made such applications for the Gila National Forest (State Engineer Permits Nos. 2844 & 2868, issued on May 31, 1955, and October 10, 1955, authorizing the appropriation of 2.4194 acre-feet and 2.1494 acre-feet respectively). In view of this situation it is unlikely that either Congress or the Forest Service entertained the thought of acquiring legally recognized rights to minimum stream flows when the concept of a usufruct occurring in nature was repugnant to the water laws with which the Forest Service would have complied. [Cf., e.g., *Harkey v. Smith*, 31 N.M. 521, 217 P.550 (1926)]. In short, prior to 1955, the notion was unimaginable, and it has only been since the Forest Service was given a novel theory upon which to

assert its claims that it developed the imagination with which to envision minimum stream flows as legally cognizable water rights.

In support of its new claims—this second generation of reservation water rights—the United States explains that:

(a) review of the history of the National Forests reveals clearly that the claimed instream uses have been essential and valid purpose of the National Forests from the time they were created . . . official records establish that even before the Forests had been withdrawn they had long been used for recreational purposes requiring the maintenance of adequate streamflows. (*Objections*, p.3).

The allegation, however, is a *non-sequitur*. New Mexico recognizes that people have historically fished in the streams of our national forests, but unlike the United States New Mexico believes this only demonstrates the obvious geographical and historical reality that national forests tend to be created in the headwaters and highlands of the western states, and it has naturally followed that fishermen have fished in forest streams. They will certainly continue to do so after the United States' claims for a minimum streamflow are denied; in other words, the proclivity of fish to reside in forest streams is not a specific congressional recognition of a minimum streamflow as an essential purpose for which the forest reservation was made. Indeed, fishermen fish in many stream sections outside forest lands in New Mexico, and no one has ever seriously contended that a "water right" resulted in favor of the fisherman.

The legislative keystones of the national forest system are the Creative Act of March 3, 1891 [16 U.S.C. § 471 (1964)] and the Organic Administration Act of June 4, 1897 [16 U.S.C. § 475 (1964)]. The Creative Act authorized the establishment of national forests. It states in pertinent part:

The President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part

of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute on its face is uninformative about the purposes of the national forests. Accordingly, in 1897 Congress set out to clarify the functions of the national forests and adopted a statement of "purposes for which national forests may be established and administered" as part of the Organic Administration Act. This provision reads in pertinent part as follows:

All public lands designated in reserve prior to June 4, 1897, by the President of the United States under the provisions of Section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established except to *improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States*; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (Emphasis added)

This statute stands as an unambiguous assertion of the purposes of our national forests, and remained the only legislation which set forth the criteria for the creation of national forests until the enactment of the Multiple Use-Sustained Yield Act in 1960 [16 U.S.C. § 528 (1964)]. Basically, two purposes were authorized, namely the protection of the watershed in order to ensure dependable water supplies for downstream appropriators,

and protection of the forest in order to secure an adequate and continuous supply of timber. These two purposes, unamended by federal legislation until 1960, are made even more clear by the legislative history of the two fundamental acts.

The provision of the Creative Act authorizing creation of national forests was passed as § 24, entitled "An Act to repeal the timber culture laws, and for other purposes." The timber culture statutes were regarded as ineffectual at best, and in some instances as invitations to fraud. [See 21 Cong. Rec. at 2341, 51st Cong. First Sess. (1890)]. Out of this concern to insure sustained timber yield and protect water supplies, Congress authorized the creation of national forests. Action was urged to:

secure the magnificent forests on these lands from destruction by axe and flame within a comparatively short period . . . that will be needed as an important source of timber supply for the western states for all time to come . . . the greatest value of these forests to the present and future inhabitants of the western states is in the assistance they render to agriculture through their influences on the water supply and the climate . . . there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulatory of rainfall and water supply. [Memorial of the American Forestry Association, 21 Cong. Rec. at 2537-38, 51st Cong., 1st Sess., (1890)].

By 1897 about 17 million acres of the public domain had been set aside as national forests. [30 Cong. Rec. 908, 919, 55th Cong. 1st Sess., (1897)]. In 1896 the Secretary of the Interior, in conjunction with the National Academy of Sciences, appointed a committee of scientists to examine the national forests and recommend changes in policy. This action reflected the contemporary apprehension that the national forests had been insufficiently attended by the federal government and consequently suffered from uncontrolled fire, grazing, and timber cutting. [Cf., "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inaugura-

tion of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Senate Doc. No. 105, 55th Cong. 1st Sess., (1897)]. The Committee recommended, among other proposals, that the President reserve about 21 million additional acres of land in Wyoming, Utah, Montana, Washington, Idaho, and South Dakota. On February 22, 1897, President Cleveland issued an executive order reserving the parcels designated by the Committee. (30 Cong. Rec. 900) These reservations provoked sustained protests from Western Congressmen, who objected that the boundaries were drawn indiscriminately and that the economic survival of thousands of people living within the limits of the new reservations was threatened. (Id., p. 908). Congress reacted by suspending the executive order of February 22, 1897, by defining the purposes for which the forest could be reserved, and by adopting a set of provisions concerning forest management and economic uses within the forest. Accordingly, it can be seen that the statement of purposes embodied in 16 U.S.C. § 475 was part of a restrictive measure designed to control the development of our national forests.

The Congressional debates and Committee reports pertaining to the Organic Administration Act also support the construction that Congress perceived the need for national forests in terms of protection of timber and conservation of the capacity of watershed lands to continuously produce a steady water supply. In this regard Senator White from California remarked:

We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply. (30 Cong. Rec. p. 917).

Representative McRae from Arkansas, one of the authors and principal sponsors of both the 1891 Act and the 1897 Act, elaborated at length upon the need for national forests:

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams

in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

...

The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established. (30 Cong. Rec. at 966).

Representative Ellis from Oregon emphasized the function of national forests in preserving a water supply, as opposed to maintaining merchantable timber:

They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such. . .

... as well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reser-

vations is not to save the timber for future use so much as to preserve the water supply.

....

I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply. 30 Cong. Rec. p. 1006-07.

Representative Ellis' remarks were echoed in the same session by Representative Loud from California, whose comments further indicate the basic concern was to establish and manage forests in order to preserve the waters arising therein for the use of the people below the watershed:

... I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.

That is the main object of the forest reserves in the State of California . . . 30 Cong. Rec. at 1399.

Finally, the "Report of the Committee upon the Inauguration of the Forest Policy" (Sen. Doc. No. 105), which precipitated the Organic Administration Act, emphasized the same two fold principle:

The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century. . .

Your committee is of the opinion that is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products. . .

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. p. 36.

The legislative history of the Creative Act and the Organic Administration Act, the first of which provides the authority to reserve lands from the public domain as national forests, and the second of which describes the purposes for which the forests could be reserved, make it abundantly clear that a major purpose of forest reservations is the protection of the watershed in order to provide water not to the forest administrators but to the water users below the sheds. In this light the tendentious character of the government's analysis of the legislation becomes apparent. In quoting § 24 of the Creative Act, for instance, the United States emphasizes the clause that makes it possible to reserve forest lands having no commercial value:

Sec. 24. The President of the United States of America may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, *whether of commercial value or not, as national forests*, and the President shall by public proclamation declare the establishment of such forests and the limits thereof. (Objections, p. 3).

The United States then cites to B. E. Fernow's *Report of the Chief of the Division of Forestry* (1891), noting his belief that the secondary objects of the forests were aesthetic and recreational.* Curiously, though, the conclusion the government draws is that because the forests need not be of commercial value and because Fernow wanted to encourage hunting and fishing, "uses of the National Forests involving instream uses and requiring

* These, of course, are not found in the legislation, but to Fernow, as to most of us, they seem reasonable.

a continued adequate flow of water were considered and implemented." (Objections, p. 5). However, as is clear from a reading of the legislation and its history, there is less extraordinary explanation of the fact that the forest reserves need not be of commercial value, viz., that the lands were reserved not only for the preservation of economically valuable timber, but also to preserve and manage the watershed in order to ensure a dependable water supply. Prudent watershed management, of course, is desirable wherever it might protect the downstream appropriators from uncontrolled, capricious runoff—regardless of whether the watershed timber has any commercial value. In other words, from the fact that the Creative Act authorized the reservation of forest lands having no commercial value we need not conclude that some forests are reserved primarily for recreation and of necessity must be judicially assured of minimum flows. On the contrary, we should conclude that all forests were reserved for the protection of downstream water users, and not in order to protect the proprietary interests of the United States in derogation of the rights of others.

Continuing its argument the United States refers to the Organic Administration Act, without reviewing its legislative history, and concludes that "(a) careful reading of the entire provision as a unit is necessary to grasp the real intent of Congress." (Objections, p. 6). Under-emphasizing the *stated* purposes of "securing favorable conditions of waterflows" and furnishing "a continuous supply of timber," the government elicits the "real intent" as follows:

The Act further provides that:

The Secretary of Interior (now the Secretary of Agriculture, 33 Stat. 628) shall make provisions for the depredations upon the public forests and forest reservations which may have been set aside for which may hereafter set aside under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, *namely, to regulate their occupancy and use* and to preserve the forests thereon from destruction. (Id., p. 6, emphasis added by United States).

"This mandate for regulations for the occupancy and use of the Forests," the government concludes, "indicates that Congress envisioned uses broader than watershed protection and timber production, namely, multiple use and utilization of all of the resources of the National Forests." Once again, however, there is a less extraordinary interpretation of the phrase in light of the legislative history that produced it, namely that human beings had to occupy and use the forests in order to accomplish the stated purposes for which the forests had been reserved, e.g. sheepherders, cattlemen, and timbermen.

In view of the explicit language of the Creative Act and the Organic Administration Act as to the purposes for which national forests were to be created, and in view of the relevant legislative history of the two acts, it is clear in our opinion that no recreational uses were authorized which would have required the assertion of judicially recognizable "rights" to minimum flows. It is also our view that the government's analysis in this regard is patently wrong. Additionally, however, the government argues that the notion of a reserved right to minimum flows—established as incidental to recreation in its earlier argument—has been implicitly recognized and confirmed in numerous appropriation acts, climaxed finally by the Multiple Use-Sustained Yield Act of 1960.

The appropriation acts to which the government alludes are: 1) four acts designating funds "to transport and care for fish and game supplied to stock the National Forests or the waters therein;" 2) acts appropriating funds for outhouses and fire prevention; 3) an authorization providing that the Secretary of the Interior can rent or lease areas near medicinal springs; 4) an amendment of an appropriation act providing that forest agents shall aid in enforcing state fish and game laws; 5) an act authorizing the use of certain areas for resort facilities; 6) an act authorizing the Secretary of Agriculture to distinguish between forests lands chiefly valuable for stream flow protection or for timber production; 7) an act appropriating funds for wildlife study; and 8) an act authorizing the Secretaries of Agriculture and Interior to cooperate in watershed management. (Objec-

tions, pp. 14-15). In response to this parade of federal legislation New Mexico would ask the following: How do these acts lend support to the judicial recognition of rights to minimum flows? The answer-in short, is that they don't. If there were any recreational advantages to the preservation of forest timber and management of the watersheds it is clear that they were entirely incidental to the stated purposes of the forest reserves. In his *Report of the Chief of the Division of Forestry* for 1891, Fernow described the situation as follows:

The writer has every year in his reports pointed out the need of a change in the policy of the Government with regard to the public timberlands, under which large areas once heavily timbered have been turned into fire-swept barrens, and he has dwelt upon the incongruity of having a division of forestry in a department of the Government to preach rational forest management, while such is entirely absent from the Government timberlands.

A change in this policy seemed at least to be contemplated by the enactment of the law dated March 3, 1891, in which the President is empowered to set aside forest lands for reserves. . .

....

There can hardly be any doubt, however as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more especially for the future prosperity of the people residing near such reservations, namely, first, to assure continuous forest cover of the soil and mountain slopes and crests for the purposes of preserving or equalizing water flow in the streams which are to serve the purposes of irrigation, and to prevent formation of torrents and soil-washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction. Secondary objects, such as can

and will be subserved at the same time with those first cited are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate, but the first class is infinitely more important, and the second is easily provided for in securing the first.

Since there have arisen misconceptions in regard to these propositions it may, perhaps, be proper to emphasize the fact that the multiplication of national parks in remote and picturesque regions was not the intent of the law, but it was specifically designed to prevent the great annual conflagrations, to prevent useless destruction of public property, to provide benefit and revenue from the sale of forest products as needed for fuel and lumber by residents of the locality, and altogether to administer this valuable and much endangered resource for present and future benefit. These, I take it, are the objects of the proposed reservations.

Forest management, such as contemplated, does not destroy natural beauty, does not decrease but gives opportunity to increase the same, and tends to promote the greatest development of the country, giving regular and steady employment, furnishing continuous supplies, and making each acre to its full duty in whatever direction it can produce most, pp. 223-25.

As voiced by the Chief Forester, it was the position of the Department of Agriculture that forest recreation, such as hiking, camping, and fishing, was a "purpose" of the forests only to the extent it was incidental to the explicit goals of timber management and watershed protection. Subsequent appropriation acts which recognized these incidental advantages of the forest reserves in no way detract from the fact that the forests were established to protect the watersheds from destruction by fire and excessive logging and to insure an ade-

quate supply of timber. Conservation of the watershed yield was paramount and reflected the contemporary anxiety that the disappearance of the forest cover would lead to rapid spring snow-melts and massive erosion, resulting in rampaging streams in the spring and dry streams in the summer. The thrust of this effort was not to guarantee to the forest administrators minimum flows for aquatic habitat, but rather to further the utilitarian principle of securing an economically dependable source of water for downstream appropriators. To achieve this end Congress did not suggest that the courts effect an apotheosis of the water supplied by nature. On the contrary, it may be reasonably assumed that Congress, like the State of New Mexico, continues to have a tacit faith in the hydrologic cycle.

The Multiple Use-Sustained Yield Act of 1960 (74 Stat. 215, 16 U.S.C. § 528) is the first piece of federal legislation to explicitly broaden the purposes of our national forests:

Sec. 1—It is the policy of the Congress that National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of the Act are declared to be supplemental to, but not in derogation of, the purposes for which the National Forests were established as set forth in the Act of June 4, 1897.

As the United States has pointed out by reference to House Report No. 1551 and Senate Report No. 1407:

"The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897.

In other words, the United States cannot glean even from the Multiple Use-Sustained Yield Act the basis upon which to assert a right to minimum flows if such a right would take away from the purpose of securing the stream flows for other appropriators. In the case at bar, where there is an upstream appropriator, this is precisely what a judicial recognition of the government's claim would accomplish.

In conclusion two things are clear: 1) that a claim to a reserved water right for minimum stream flows in our national forests would have been inconceivable prior to the Pelton Dam decision in 1955, and 2) that the purposes for which our national forests have been reserved militate against the minimum flow claims. It should also be remembered that the government is not relying on explicit support but rather an implication. In effect, the United States is urging upon the court an unprecedented enlargement of the reservation doctrine on the basis of a chain of inferences, none of which is even a necessary inference. First it is inferred from the early legislation and subsequent appropriation acts that recreation was a recognizable purpose of reserving national forest lands. This, in itself, is unpersuasive in light of relevant legislative history, but on top of this the United States further urges that from the appropriation acts yet another inference must be drawn, namely that minimum flows were indispensable to the administration of the forests. It is New Mexico's belief, on the contrary, that the government's argument is simply untenable. Accordingly, the United States could not have a lawful right to minimum stream flows. If the United States wants guaranteed minimum flows the way to accomplish this end is not by asking a court of equity to declare that there will be such flows, but rather by complying with the statutes authorizing the creation, use, and administration of the forests, i.e., to manage the forest

watersheds in such a way as to secure "favorable conditions of water flows."

/s/ Richard A. Simms
 RICHARD A. SIMMS
 Special Assistant Attorney General
 State Engineer Office
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 Santa Fe, New Mexico 87503
 Attorney for Plaintiff

February 24, 1975

The Honorable Irwin S. Moise
 Sutin, Thayer & Browne
 P. O. Box 1945
 Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,
 Luna County Cause No. 6326.

Dear Justice Moise:

I am writing to confirm the setting of March 6, 1975 for oral argument on the issue of minimum stream flows. It is my understanding that the matter will be heard in your office at 1:30 p.m.

Sincerely yours,

/s/ Richard A. Simms
 RICHARD A. SIMMS
 Special Assistant Attorney General

March 7, 1975

Honorable Irwin S. Moise
Sutin, Thayer & Browne
P. O. Box 1945
Albuquerque, New Mexico 87103

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.
Luna County Cause No. 6326

Dear Justice Moise:

After some consideration of your decision yesterday, and in view of your willingness to have the findings and conclusions drawn in such a way as to indicate that the decision is not a precedent for the general proposition that the United States has reserved rights for minimum stream flows in our national forests, it occurs to me that certain matters should be clarified before I can draft the findings and conclusions appropriately.

During oral argument I urged that the only way a right to federally reserved minimum stream flows could be utilized would be in derogation of one of the two express purposes of the forest reserves, namely the management of the watershed in such a way as to maximize the yield to downstream appropriators. As I understand your decision you agree with this proposition as a general matter, but within the facts of the instant case it is your view that it would not be in derogation of a junior appropriator's right for the United States to assert a minimum flow right against a *transferred* use on private property within the forest. In this regard you stated, as I recall, that the state legislature could rescind the right of an appropriator to change his place or method of use, and accordingly the assertion by the United States of a minimum flow right against a junior transfer would not be in derogation of the transferred right. Where I am confused, however, is in the situation where the junior appropriator has always exercised his right on private property within the forest, at a point upstream from the stretch of the stream

wherein a minimum flow is claimed. Under these facts, as I understand your decision, the United States would not have a right to a minimum flow.

The distinction, of course, is extremely important, and after the argument yesterday I failed to have the matter clarified. As you can understand, however, I would like to tailor the legal conclusions in this regard to the facts of this adjudication in as precise a way as possible. For this reason I thought it would be useful to request that the matter be clarified before I draft the relevant findings and conclusions.

Sincerely,

RICHARD A. SIMMS
Special Assistant Attorney General

LAW OFFICES OF
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March 11, 1975

Mr. Richard A. Simms
Special Assistant Attorney General
Office of State Engineer
Bataan Memorial Building
Santa Fe, New Mexico 87501

Mimbres Valley Irrigation Co. v.
Salopek, et al., Luna County
Cause No. 6326

Dear Mr. Simms:

I have your letter of March 7 stating that you are somewhat confused as to how to prepare the Findings on the issue of minimum stream flows which was argued last week. You state that your confusion arises "in the situation where the junior appropriator has always exercised his right on private property within the forest, at a point upstream from the stretch of the stream wherein a minimum flow is claimed."

As I understood the facts, this is not the situation in the instant case and that there is no appropriation by individuals above these stretches where a minimum flow is sought. Accordingly, the Finding should be to this effect and, these facts being true, the minimum stream flow is adjudged to the United States.

If, in fact, the situation were as you indicate, the ruling might be different, but the Findings and Conclusions here should only cover the situation under the facts as found.

I trust that this answers your question. If it does not, you may communicate with me again.

Very truly yours,

/s/ Irwin S. Moise
IRWIN S. MOISE

[Submitted to Special Master March 14, 1975]

STATE'S SECOND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
 - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
 - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,

- 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W. N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within

the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3-2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10W	535		.02	Domestic Residential	3-2-1899

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
5. That said instream uses numbered 024, 511, and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard

Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest $\frac{1}{4}$ of Section 10; thence east to the west line of northeast $\frac{1}{4}$ of southwest corner of same; thence east along the south line of same and along south line of northwest $\frac{1}{4}$ of southwest $\frac{1}{4}$ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast $\frac{1}{4}$ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence N. 1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mex-

ico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'W., 669.00 ft. to the Northeast Cor.; thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N. 81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.
12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.
9. That with respect to the above-listed uses in the Gila National Forest where the use has been made

under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.

10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use—Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall

have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

Special Master

, 1975.

[Filed in State District Court Apr. 2, 1975]

OBJECTIONS OF UNITED STATES TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUBMITTED BY THE STATE OF NEW MEXICO
ON MARCH 14, 1975.

The United States interposes the following objections together with points and authorities in support of its objections to the proposed findings of fact and conclusions of law submitted by the State of New Mexico on March 14, 1975.

I

The United States objects to the inclusion of the word "junior" in proposed findings of fact 3 and 4. While it is true that there are no private junior appropriators upstream of the instream uses in question, this statement is misleading. It is also true that there are no senior upstream appropriators. The inference that could be drawn from findings 3 and 4 is that if a junior appropriator were upstream the United States might not have a right to the upstream uses as against that junior appropriator. From this it could be argued, that if a junior appropriator should appear at any time upstream from the instream uses in question, this junior appropriator could then use water at the expense of the rights to minimum streamflows held by the United States. From the statements of the Special Master at the hearing in this case on March 6, 1975, it is clear that this was not what the Special Master intended to find. The United States would have no objections to proposed findings of fact 3 and 4 if the word "junior" were stricken from these findings.

II

The United States objects to proposed finding of fact 5, which reads as follows:

5. That said instream uses numbered 024, 511 and 786 can be made without interfering with the ex-

press purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.

Apparently the basis for this proposed finding is the finding, quoted at page 2 of the State's memorandum brief, of the Special Master in *Arizona v. California*, 373 U.S. 546, that one of the purposes for which the national forests were founded was "the protection of watersheds and the maintenance of natural flows in streams below the sheds." While it is true that the fulfillment of this particular purpose of the national forest would result in more water available for private appropriators below the national forest, it would also produce other equally valid results such as improved fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc. To avoid confusion it is suggested that the exact language of the Special Master in *Arizona v. California*, be used in finding 5, so that it would read:

5. That said instream uses numbered 024, 511, and 786 can be made without interfering with one of the express purposes of the Gila National Forest which is the protection of watersheds and the maintenance of natural flow in streams below the sheds.

III

The United States objects to proposed conclusion of law 10, which reads as follows:

10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511 and 786, and consequently because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

For the reasons stated in objections I and II, we urge that conclusion of law 10 be modified to read as follows:

10. In view of the fact that there are no appropriators upstream of the instream uses numbered 024, 511 and 786, and because said federal uses can be made without interfering with upstream appropriators or with one of the express purposes of the Gila National Forest of managing the watershed for the protection of watersheds and the maintenance of natural flow in streams below these sheds, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

IV

The United States objects to the proposed conclusion of law 12, which reads as follows:

12. That until the enactment of the Multiple Use—Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forest for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

We know of no present uses by the United States on lands or from waters covered by this adjudication that qualify as "substantial works involving large consumptive uses." Therefore, such a finding at this time is totally irrelevant. It is urged that if this question should be decided in this case it should be decided after the United States has submitted its list of ultimate future needs for water on the forest lands in the Mimbres watershed in compliance with conclusion of law 13 and then only if any of the future needs claimed by the United States may properly be classified as "substantial works involving large consumptive uses." Such an important question as this should be decided only when properly raised by the facts in the case

where it can properly be weighed with the circumstances raising the issue.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

By: /s/ James B. Grant
JAMES B. GRANT
Assistant United States Attorney

/s/ Donald W. Redd
DONALD W. REDD
Attorney, Department of Justice
Washington, D.C. 20530

REPORT OF SPECIAL MASTER

[Filed May 5, 1975]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:
 - a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
 - b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands

- within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
 - d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10,

17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3-2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic Recreational	7-21-1905
18 16S 9W	229		.03	Domestic Recreational	7-21-1905
18 16S 9W	230		.03	Domestic Recreational	7-21-1905
19 16S 9W	231		.01	Domestic Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910

Location Sec., T., R.	U.S. Government Identification Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
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7 16S 11W	639		6.87	Domestic Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908
Total		6.00	91.18		

3. That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
4. That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.

5. That said instream uses numbered 024, 511, and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
6. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest $\frac{1}{4}$ of Section 10; thence east to the west line of northeast $\frac{1}{4}$ of southwest corner of same; thence east along the south line of same and along south line of northwest $\frac{1}{4}$ of southeast $\frac{1}{4}$ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast $\frac{1}{4}$ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township lines; thence west to the point of beginning, containing approximately 8,840 acres.
7. That on January 2, 1941, all of the lands in the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.

8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.
9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29°43'E., 37.30 ft. to Cor. No. 1-B; thence N.60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89°03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13' W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence

N.1°43'W., 3493.49 ft. to the place of beginning.
Containing 482.824 acres, more or less.

10. That of that portion of the SW ¼ of Section 25, the SE ¼ of Section 26, the NE ¼ of Section 35, and the NW ¼ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE ¼, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor.; thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as compared to present uses and not in the category of minor, modest, or insignificant in amount.
12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to

each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.
5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the

withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.
13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the

United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE
Special Master

May 2, 1975.

[Filed in State District Court May 15, 1975]

STATE'S OBJECTIONS TO MASTER'S REPORT

TO: Donald Redd
Land & Natural Resources
Department of Justice
Washington, D.C. 20530
James B. Grant
Assistant U.S. Attorney
District of New Mexico
P. O. Box 607
Albuquerque, New Mexico 87103

Please take notice that the State of New Mexico, ex rel., S. E. Reynolds, State Engineer, objects to the report of Irwin S. Moise, Special Master, filed herein on May 5, 1975, in the following particulars:

1. Finding of Fact No. 2 is incorrect insofar as it recognizes that the United States is entitled to reserved in-stream water rights based upon the purposes for which the Gila National Forest was withdrawn from the public domain.
2. Conclusion of Law No. 10 is legally erroneous.
3. The State of New Mexico further objects to all Findings and Conclusions which recognize that the United States is entitled to reserved water rights for instream uses based upon the purposes for which the Gila National Forest was withdrawn.

The State of New Mexico, ex rel. S. E. Reynolds, State Engineer, therefore moves the court to take such action on these objections and on the report of the master as may be proper.

Respectfully submitted

/s/ Paul L. Bloom
PAUL L. BLOOM
RICHARD A. SIMMS
Special Assistant Attorneys General
State Engineer Office
Bataan Memorial Building—
State Capitol
Santa Fe, New Mexico 87503

September 2, 1975

Donald Redd, Staff Attorney
Land & Natural Resources
Department of Justice
Washington, D.C. 20530

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,
Luna County Court No. 6326.

Dear Mr. Redd:

Please be advised that New Mexico's objections to the master's report have been set for oral arguments before Judge Hodges on Tuesday, February 2, 1976, at 10:10 A.M. at the Luna County Courthouse in Deming, New Mexico.

Sincerely,

/s/ Richard A. Simms
RICHARD A. SIMMS
Special Assistant Attorney General

STATE OF NEW MEXICO
STATE ENGINEER OFFICE
Santa Fe

February 4, 1976

Hon. Norman Hodges
District Judge
P. O. Box 390
Silver City, New Mexico 88061

Re: Pending Objections to Special Master's Report,
Mimbres Valley Irrigation Co. v. Tony Salopek,
et al., Luna County No. 6326.

Dear Judge Hodges:

During argument yesterday on the referenced Objections I asked for leave of the Court to make an untimely objection to conclusion No. 9 of Judge Moise's Findings and Conclusions, believing at the time that No. 9 was recited as a finding instead of a conclusion. However, upon reviewing our files and determining that it is a conclusion and not a finding, I hereby withdraw my motion for the reason that no objection need be made to challenge a master's conclusion of law. [See, Moore's Federal Practice. §§ 53.11 and 53.12(5). New Mexico Rule 53e(2) and the federal rule are identical.]

The same principle would apply to conclusion No. 11, which states that "among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting." Despite the fact that my own view of the matter, as Mr. Redd pointed out, was different in 1972 when I first began the practice of water law, it is clear that recreation was not a purpose for which the Gila National Forest lands could have been withdrawn from the public domain. In this regard I would invite your Honor's attention to the state's Memorandum of Law, especially pp. 24-29.

If any further discussion of this matter would be useful please advise.

Sincerely,

Richard A. Simms
Special Assistant Attorney General

[Submitted to State Judge Apr. 15, 1976; Filed in
State District Court June 4, 1976]

OBJECTIONS OF UNITED STATES TO PROPOSED
ORDER SUBMITTED BY STATE ENGINEER
SUSTAINING OBJECTIONS AND MODIFYING
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Introduction

This is an action for the adjudication of the rights to the use of the waters of the Mimbres River stream system. This case was referred to a special master for the determination of the individual water rights. With respect to the water rights of the United States in this watershed, hearings were held where live testimony was received, documentary evidence was filed, and oral and written arguments were presented to the Special Master. After careful consideration of the evidence and the oral and written arguments, a report was filed by the Special Master in the form of Findings of Fact and Conclusions of Law.

On May 10, 1975, the State Engineer, through his attorney, filed objections to the Special Master's report. These objections were directed solely to the recognition by the Special Master of water rights reserved by the United States for instream uses based upon the purposes for which the lands within the Gila National Forest were withdrawn from the Public Domain and included within the National Forest.

After the submission of written and oral arguments, the court, in a letter to counsel for the State Engineer and the United States dated March 1, 1976, announced he had "decided to grant or sustain the State Engineer's objections to the Master's Report." Counsel for the State Engineer was directed to "prepare a proper form of Order or Decree" and submit it to counsel for the United States, and then to the court.

On March 5, 1976, counsel for the State Engineer submitted a proposed order designated as "Order Sustaining

Objections and Modifying Findings of Fact and Conclusions of Law." This proposed order not only deleted the findings of fact and conclusions of law from the Master's Report which recognized the rights of the United States to the three instream uses for "fish" purposes but made other changes on items as to which no timely objections had been made and where there was no evidence supporting the changes. These changes will be discussed in more detail in the specific objections raised in this memorandum.

Objections

1. It was Error to Delete the Findings Recognizing the Rights of the United States for the Three Instream Uses.

In the Master's Report, finding of fact no. 2 reads as follows:

As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Following this there is a tabulation of 37 separate uses. For each use there is shown the location of the use, the government identification number for the use, the quantity of water used in cubic feet per second or acre feet per year, the purpose of the use and the priority date of the right under which the uses are made. Three uses, designated as numbers 024, 511 and 786 were shown as using 2 cubic feet per second each, with no consumptive use and the purpose of each of these was listed as "fish." There was testimony that one of these was for the protection and propagation of a native trout found only in the Gila National Forest which is on the Endangered Special List. The Special Master stated, at the final hearing held by him on the validity of the United States claims for rights to instream uses to maintain minimum flows for valid forest purposes, that he could judicially notice that these live streams not only supported fish life but served other valid forest purposes such as erosion control, fire

protection, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, aesthetics, etc.

In his letter of March 1, 1976, the court raised the following question:

1. Would it be desirable to specify that both the United States of America and the State of New Mexico should be restricted or prohibited from permitting or recognizing:

A. Establishment of a new appropriative water right upstream from the fish areas (Nos. 024, 511 and 786), or

B. Transfer of a senior appropriative water right upstream from the "fish" areas;

if either A or B would interfere with:

A. Improving and protecting the forest within the boundaries; or

B. Securing favorable conditions of water flows (within and below the forest boundaries). (If, incidentally or coincidentally, this helped the streamflow in the "fish" areas—so be it.)

We agree that it is necessary to provide protection to live streamflows within our national forests in order that the forest service officials may effectively perform their duties in the fulfillment of the very basic purposes for which the national forests were established—improving and protecting the forests within the boundaries and securing and protecting favorable conditions of water flows. See Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. 475. We doubt that the provision suggested by the court, however, would afford the desired protection. If no right to maintain the live streamflows on the forest lands is recognized it would be extremely difficult for either the forest service officials or the State Engineer to refuse to permit diversions that would dry up these forest streams on the grounds that it would be injurious to the forest and its resources.

We suggest that there is a very simple solution to this problem. Uses 024, 511 and 786 in finding of fact no. 2 should be included as valid uses for forest purposes. As the purposes for these uses, instead of simply listing "fish," there should be added, as purposes, the following: erosion control, fire protection, watershed protection, maintenance of natural flow, wildlife habitat protection, aesthetics, etc. With such a finding and the appropriate corresponding conclusions of law recognizing the right to maintain live streamflows for valid forest purposes, it would not only be made clear that the forest service officials have the clear cut duty to protect these live streamflows but they would have the means to protect them from threatened encroachments and this would not impair any existing water rights or uses.

In his letter of March 5, 1976, counsel for the State Engineer hints that the State Engineer could protect these streamflows from threatened encroachments. We have no assurance, however, that he would make any attempt to protect these streamflows should they be threatened. In view of the vigor with which he has opposed the recognition of the right to maintain these streamflows, it seems rather doubtful that he would make any attempt to protect them. Furthermore, under existing New Mexico Law, it is extremely doubtful that the State Engineer could protect these live streamflows on the forest lands, even if he wanted to, in the absence of a judicially recognized right to maintain them. See "Appropriation by the State of Minimum Flows in New Mexico Streams," *Natural Resources Journal* (University of New Mexico School of Law) Vol. 15, No. 4, October 1975, page 809.

2. It was Error to Delete the Word "Recreational" from Uses No. 226, 229, 230, 231 and 614 and to Change Conclusion of Law No. 11 which Recognized Recreation as a Valid Forest Purpose for which Water Rights were Reserved.

The State Engineer originally agreed that recreation was a valid forest purpose for which water rights were withdrawn by the withdrawal of the lands from the Pub-

lie Domain for forest purposes. No objections were filed by the State Engineer to the findings and conclusions in the Master's Report recognizing reserved water rights for recreation. After it was pointed out, however, that this was inconsistent with the arguments he had made opposing recognition of the United States' rights to the use of waters on national forest lands to maintain live stream-flows, he reversed his position. In the Master's Report, the purposes of uses 226, 229, 230, 231 and 614, in finding of fact no. 1, were shown as both "domestic" and "recreational." Conclusions of law no. 11 read as follows:

That among the uses to which waters of the Mimbres River Stream System reserved for the National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.

In his proposed order modifying the findings of fact and conclusions of law, the State Engineer has deleted "recreational" as one of the purposes for uses 226, 229, 230, 231 and 614 so that the purpose for each of these reads simply "domestic." Conclusion of law no. 11 was deleted. As a substitute, conclusion of law no. 10 in the State Engineer's proposed order reads as follows:

That recreation is not among the purposes for which the above described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

In his letter of March 5, 1976, counsel for the State Engineer states:

The domestic residential uses listed in finding no. 2 are uses made by forest service personnel, and the listed priority dates are appropriate.

We agree that the listed priority dates are appropriate. The statement that the domestic residential uses are uses made by forest service personnel are grossly in error as to uses 226, 229, 230, 231 and 614. Use no. 226 is under a special use permit for a summer home which is not transferable, may be revoked under certain circumstances

and will expire on the death of the permittee. Uses 229, 230 and 231 are public picnic grounds owned, operated and maintained by the Forest Service. There are no forest service officials living at these areas and no facilities provided for them to do so. Use no. 614 is a camp used under permits issued by the Forest Service to groups. It is used approximately once a year for several days by forest service officials for conferences. The buildings and facilities at this camp were built and are owned by the United States.

In his letter to the court, dated March 29, 1976, counsel for the State Engineer objected to the United States presenting new data and information at this late date. We recognize that this is a bit unusual. We submit, however, that this is not only justified but is made necessary by the State Engineer's attempt to delete findings of fact made by the Special Master which were supported by substantial evidence and to substitute findings of fact which are not only supported by no evidence but are in fact erroneous.

In his letter of March 29, 1976, counsel for the State Engineer makes the following statement:

To date there have been no published opinions on the subject, but three district court decisions have rejected the government's claims, namely, the master's decision in federal district court for the district of New Mexico, your decision, and a state district court decision in Idaho. There has been one decision to the contrary, namely, *Soderman v. Kackley*, arising in a different judicial district court in Idaho, and a copy of which was presented to the court during argument in February. *Soderman* is set for argument before the Idaho Supreme Court on April 5, 1976, and for the same reasons that the Attorney General of Idaho would like to have your decision in hand, the Justice Department would prefer he did not.

We assure the court that we had no ulterior motives in asking for extra time within which to submit objections to the State Engineer's proposed order. Our request was motivated solely by a desire to set the record straight on

the various points so that you could have the pertinent facts before you when you made your final decision as to how your order should read with respect to the Master's Report. The fact that counsel is in error as to the count on court rulings for and against the recognition of reserved rights to maintain live streamflows on national forest lands will be discussed in a later section of this memorandum. The point we wish to make here is that the State Engineer and his counsel completely overlook the fact that there have been a number of cases in federal and state courts recognizing reserved rights held by the United States to the use of waters on national forest lands for the purpose of recreation.

We have already invited the court's attention to the fact that the Supreme Court of the United States approved a finding of the Special Master in *Arizona v. California*, that the national forests were established for the following purposes:

1. The protection of watersheds and maintenance of natural flow in streams below the sheds;
2. Production of timber;
3. Production of forage for domestic animals;
4. Protection and propagation of wildlife; and
5. Recreation for the general public.

We also provided the court with a copy of the decree of the Superior Court of the State of Washington In and For Okanogan County in the *Chiliwist Creek* adjudication. This decree recognizes the reserved right of the United States "to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely timber management and production and related purposes including fish and wildlife management, livestock grazing and recreational activities."

In the case of *Glenn v. United States*, Civil No. 153-61, in the United States District Court for the District of Utah, the plaintiff challenged the right of the United

States to divert water from a spring on the National Forest and pipe it to a recreation area constructed by the Forest Service on national forest lands. This spring was tributary to a creek from which plaintiff had an appropriate right under a permit issued by the State of Utah to divert and use three acre feet of water per year for irrigation. The court expressly found that "[t]he recreation site and pipeline and diversion facilities constructed by the United States Forest Service were authorized by the Act of June 4, 1897, 30 Stat. 35" and that the United States had a right to make this use of these waters for recreation purposes "by reason of its reservation from entry on February 22, 1897, by the President of the United States." A copy of the findings of fact and conclusions of law in that case is attached.

In the case of *United States v. Alpine Land and Reservoir, et al.*, No. D-183 BRT in the United States District Court for the District of Nevada, the court found inter alia, that:

Toiyabe National Forest was reserved and withdrawn from the public domain and dedicated and set apart as a national forest for the purpose of the protection of watersheds and the maintenance of favorable stream flows in and below the sheds; production of timber; production of forage for domestic animals, protection and propagation of wildlife, including fish; and recreation for the general public.

A copy of the order of the court containing the above finding in the *Alpine* case is attached.

In the case of *United States v. Fallbrook Public Utility District, et al.*, No. 1247 SD-C, in the United States District Court for the Southern District, the court found, inter alia, that:

The waters arising upon or traversing the Cleveland and San Bernardino National Forests are presently used for domestic, recreation, stock watering, fire fighting and wildlife and other beneficial purposes.

The State Engineer has cited the decision of a district court of the State of Idaho in the case entitled *Avondale Irrigation District v. North Idaho Properties*, Case No. 22418 in support of its contention that the reserved water rights for national forests do not include a right to the use of water to maintain live streamflows on national forest lands. He completely overlooks the fact, however, that the *Avondale* case recognizes rights to the use of waters for recreation. Examples are water rights for Makin's Bay Campground and Hells Canyon Campground. That case also recognized a right to the use of water on national forest lands for livestock watering under the reserved water right. These rights were not contested by the State and were not at issue in the appeal to the State Supreme Court or in the district court after remand.

We know of no cases outside the State of New Mexico where a court, State or federal, has held that the reserved water rights for national forests did not include a right to use these waters for purposes of recreation for the general public.

3. It was Error to Change the Priority Dates of the Rights to the Use of Waters for Stockwater in Finding of Fact No. 2.

Finding of fact no. 2 of the Master's Report shows 22 national forest uses of water within the Mimbres River Watershed for Stockwater. For each of these uses the priority date shown was the date of the withdrawal of the lands where the use was made for forest purposes. No objections to these priority dates were filed by the State Engineer. After it was pointed out, however, that this was inconsistent with the arguments he had made opposing recognition of the United States rights to the use of waters on national forest lands to maintain live streamflows, he reversed his position. In his proposed order modifying the Master's findings of fact and conclusion of law, the State Engineer has arbitrarily deleted all of the priority dates for stockwater based on the withdrawal of the lands for forest purposes and substituted the date January 1, 1907, although there is no evidence to support this change.

In his letter of March 1, 1976, the court raised the following question:

2. Priority dates, as of the original forest withdrawal dates (1899, 1905, 1908, 1910) for apparent permittees' uses such as stock water and domestic residential are used in Finding of Fact No. 2.

A. Is this something that may still be litigated at a later date?

B. Would it be more appropriate to show priority dates where a permittee is involved: i.e., United States: withdrawal date; Permittee: actual appropriate date?

The rights to the use of waters on National Forest lands for watering livestock grazing on these lands under permits from the forest service, must necessarily be vested in the United States. If these water rights were vested in the permittees, it would be virtually impossible for the forest service to carry out its duties under the provisions of the Organic Administration Act of 1897, 30 Stat. 34, to protect and improve the forest within the boundaries, to regulate their occupancy and use and to preserve the forests from destruction.

Stockwatering facilities are developed jointly on national forest lands by the forest service and the permittees. Cost of the development is born by the United States and title to the facilities is retained by the United States. These facilities are maintained not only for the permitted livestock but for wildlife.

Stockwatering facilities are located at various points on the grazing allotments so as to control the grazing and prevent overgrazing of areas around watering places. For this purpose, the watering facilities are often fenced. The gates are left open where grazing is permissible. In areas that have been grazed to the extent that further livestock use would be detrimental, the gate is closed. These fenced watering facilities have smooth top and bottom wire on the fences to permit access by wildlife without injury from barbed wire.

Grazing allotments on national forest lands change hands regularly. Of the 19 allotments within the Mimbres River watershed, all but two of them have changed hands at least once within the last 20 years. Two of these allotments have had six different permittees each over the past 20 years. In all there have been 58 changes of grazing permit holders on national forest lands in the Mimbres River watershed within the last twenty years.

Grazing allotments are not unalterable. The number of cattle that may be grazed may be reduced if range conditions indicate the allotment is being overgrazed. By the same token, if range conditions indicate that the allotment could support more animals the permits may be changed by increasing the number of animals that can be grazed on the allotment. Also, the boundaries of an allotment may be changed to increase or decrease the acreage within an allotment.

Grazing permits may be terminated or applications for renewal of a permit may be denied if the permittee does not cooperate with the Forest Service officials in the grazing of his cattle on the allotment in such a way as to avoid overgrazing of certain areas and damage to the forest lands. This power to terminate, or to refuse to renew grazing permits is a powerful and effective tool in effective range management on national forest lands. Its effectiveness would be seriously impaired, however, if the right to the use of waters on the forest grazing allotments for stockwatering were vested in the grazing permittee and had to be transferred by him, with the approval of the State Engineer, to any new permit holder upon the termination or expiration of his grazing permit.

Many watering facilities on forest grazing lands are used by more than one forest grazing permit holder. This is true of several stockwatering facilities on national forest lands within the Mimbres River watershed. Allotments 508 and 270 share the use of Mimbres Lake. (Mimbres Lake is in a small closed basin between the Mimbres and Rio Grande Watersheds. The grazing allotment includes lands in both watersheds.) Uses 500 and 544 share the use of Hay Mesa Tank and Kelly Tank. Uses 500 and 558 (erroneously listed as 588 in the Mas-

ter's Report and State Engineer's proposed order) share the use of Yates Spring. Uses 558 and 587 share the use of Split Water Dam, Lower Well and Upper Well. Use 536 is used by the Forest Service to water its horses and also for stockwatering by a grazing permittee.

Use 804 is the Fort Bayard horse pasture and experimental range. The water is shared by Forest Service horses, wildlife and cattle grazed there as part of a study conducted jointly by the Forest Service and the State of New Mexico. The priority date for this use should be 1869, the reservation date of Fort Bayard. It was also used by the Army for its livestock.

We know of no cases outside the State of New Mexico where a court, state or federal, has refused to recognize stockwatering as a valid use of water for forest purposes under the reserved water right for national forests. It should be noted that the cases cited above as recognizing recreation as a valid forest use also recognize stockwatering as a valid forest use and the fact that the water right for stockwatering on national forest lands is held by the United States.

4. It was Error to Change the Master's Conclusion of Law No. 9.

Conclusion of law no. 9 in the Master's Report reads as follows:

That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service *and the permit requires that the use be undertaken in compliance with state law*, the water rights arising therefrom should be adjudicated to the permittee and not to the United States. (Emphasis added.)

No objection was filed to this conclusion. In a memorandum filed approximately eight months after the submission of the Master's Report, however, counsel for the State Engineer argued that in *all* cases where a use of waters found on forest lands was made by forest permittees, the water right should be adjudicated to the per-

mittees under state law. In his proposed order the State Engineer deleted the words "and the permit requires that the use be undertaken in compliance with state law" from conclusion of law no. 9.

16 U.S.C. § 478 was cited by the State Engineer as authority for the proposition that in all cases of use of waters found on forest lands by forest permittees, the rights to such water uses should be adjudicated to the permittee under state law. This statute reads as follows:

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads or other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything herein prohibit any person from entering upon such national forests for all other proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

This section must be read in conjunction with 16 U.S.C. § 481 which, along with 16 U.S.C. § 478 was originally enacted as part of the Organic Administration Act of June 4, 1897. 16 U.S.C. § 481 reads as follows:

All waters within the boundaries of national forests may be used for *domestic, mining, milling or irrigation purposes* under the laws of the State wherein such national forests are situated, or under the laws of the United States, and the rules and regulations established thereunder. (Emphasis added.)

In expressly spelling out domestic, mining, milling and irrigation purposes Congress made it very clear what uses of waters on forest lands should be under private rights acquired under local law. Clearly this legislation was not

intended to include those water uses closely related to the use and enjoyment of those resources which are necessarily part and parcel of the forest.

In section 3 of this memorandum we have pointed out some of the serious problems the Forest Service would have in effectively managing and protecting national forest lands if the rights to the use of waters found thereon for stockwatering were vested in the grazing permit holders.

If the State Engineer's Proposed Conclusions of Law should be adopted and construed literally, it would mean that every individual with a permit to cut timber on forest lands would need to obtain a permit from the State Engineer to appropriate water if his logging operation involves the use of waters on forest lands. It would mean that individuals obtaining a permit from the forest to camp on the national forest would need to acquire a water right under state law for the water used while camping.

5. It was Error to Delete the Master's Conclusion of Law No. 10 and to Insert the State Engineer's Proposed Conclusion of Law No. 11.

Conclusion of law no. 10 in the Master's Report reads as follows:

In view of the fact that there are no appropriators upstream of the instream uses numbered 024, 511 and 786, and because said federal uses can be made without interfering with upstream appropriators or with one of the express purposes of the Gila National Forest of managing the watershed for the protection of watersheds and the maintenance of natural flow in streams below these sheds, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.

This conclusion of law was deleted by the State Engineer in his proposed order and his proposed conclusion of law no. 11 was inserted. It reads as follows:

That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

This conclusion of law again points up the inconsistency of the position of the State Engineer and his counsel with respect to the reserved right of the United States to use waters on national forest lands to maintain live streamflows for valid forest purposes. They have argued that there is no reserved water right to maintain live streamflows because the only purposes for which the national forests were established were for production of timber and for securing favorable conditions of water flows. Even if we were to adopt their argument that these are the only valid forest purposes, it is still apparent that the maintenance of the live streams promotes those particular purposes by providing fire protection, erosion control, protecting the base flow of the streams, etc. The State Engineer's proposed conclusion of law is unequivocal, however, that the United States has no reserved rights to minimum streamflows regardless of what benefits may be derived from them or what purpose they serve.

As noted above, counsel for the State Engineer in his letter of March 29, 1976, argues that the decisions with respect to recognition of a reserved right to maintain live streamflows on national forest lands are three to one against such recognition. We suggest that such a count should bear little weight, even if accurate. We submit that the language of the court in the *Chiliwist Creek* case, *supra*, is broad enough to include the maintenance of live streamflows for the specified forest purposes. It should also be noted that the order in the *Alpine* case, *supra*, expressly recognizes the right to maintain minimum streamflows.

The court has raised the question of whether one year from entry of the order on this report will be sufficient time for the United States to quantify and specify its future water needs for forest purposes within the Mimbres watershed. The forest service officials have been working on this problem for some time and, in view of

the delays in this case, it is anticipated that one year from entry of a final order on the Master's Report should be sufficient time for the United States to perform this task.

Conclusion

Because the Master's Report is supported by substantial evidence and is correct in law, while the State Engineer's proposed changes to the Master's Report are not supported by any evidence and contain erroneous legal conclusions, the court should adopt the Master's Report as submitted by him. In the alternative, the case should be reopened for the admission of additional evidence.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

By /s/ James B. Grant, DWR
JAMES B. GRANT
Assistant United States Attorney

/s/ Donald W. Redd
DONALD W. REDD
Attorney, Department of Justice
Washington, D.C. 20530

April 27, 1976

Honorable Norman Hodges
District Judge
P. O. Box 390
Silver City, New Mexico 88061

Re: Mimbres Valley Irrigation Co. v. Salopek, et al.,
Luna County No. 6326.

Dear Judge Hodges:

In its recently filed instrument called Objections to Proposed Order Submitted by State Engineer Sustaining Objections and Modifying Findings of Fact and Conclusions of Law, which ostensibly responds to the court's decision and letter of March 1, 1976, the United States asserts that in drafting the proposed order sustaining the state's objections I "not only deleted the findings of fact and conclusions of law . . . which recognized the rights of the United States to the . . . instream uses for 'fish' purposes but made other changes on items as to which no timely objections had been made and where there was no evidence supporting the changes." The record, however, does not support the assertion.

There were three general areas of disagreement, the first of which was embodied in the state's Objections of May 10, 1975, relating to the master's recommendation that the court recognize reserved rights for claimed instream uses based upon the purposes for which the Gila National Forest lands were withdrawn from the public domain. As announced in the court's letter of March 1, 1976, these objections were sustained, and the report of the master was modified accordingly. Now, however, instead of responding to the questions posed by the court, the United States, is asking the court to ignore the record and the evidence at trial, to substitute new "purposes" for the claimed instream uses, and to change its decision sustaining New Mexico's objections. I would suggest, however, that the proper forum in which to argue the merits of your honor's decision is the New Mexico Supreme Court on appeal.

The second area of disagreement had to do with claimed recreational uses, to which the United States asserts New Mexico made no timely objection. The matter was argued at the February 3rd hearing as an objection, and it was pointed out in my letter to the court of February 4, 1976, that no formal objection need have been made to challenge a master's conclusion of law. The basis of our objection to the recreational uses, as was argued on February 3rd, was precisely the same as the basis of our objections to instream uses, and in this regard I invited the court's attention to the state's Memorandum of Law, especially pp. 24-29. There was no retreat from our objection, it was timely, and it was predicated upon the identical line of reasoning behind our objections of May 10, 1976, to certain of the master's recommended findings. For these reasons the word "recreational" was deleted from certain of the listed forest uses and the conclusion of law relating to the recreational claims was eliminated.

The United States is disturbed because New Mexico's position is allegedly inconsistent with our position as stated in a brief I wrote in 1972. The only inconsistency that could arise in this context would be the result of adhering to the statement in the 1972 brief. It is undisputably clear from the legislative history that the Gila National Forest could not have been withdrawn from the public domain for recreational purposes, and it is clear that reserved water rights, which have their genesis in the act of withdrawing lands from the public domain for particular purposes, cannot arise by virtue of the government's authority under § 478 of the Organic Administration Act to regulate such "proper and lawful" private uses of forest lands as recreational uses. In any event, it is totally academic that a different position was taken in 1972. New Mexico was not barred from making new or alternative arguments.

The third area of disagreement had to do with the recommended legal conclusion No. 9 respecting the point of law requiring that rights arising out of water uses made by forest permittees be adjudicated to them instead of the United States. In the proposed order modifying the mas-

ter's findings and conclusions, the phrase "and the permit requires that the use be undertaken in compliance with state law" was deleted. Again, timely objection to the legal conclusion was made, the matter was argued on February 3rd, and it was discussed in my letter of February 4, 1976. The United States' statement that "serious problems (would arise) in effectively managing and protecting national forest lands if the rights to the use of waters found thereon for stockwatering were vested in the grazing permit holders" is misleading. We have offered to recognize the rights as pre-1907, vested rights, and accordingly no state permits would be required, no change of ownership documents would be required with regard to successive permittees making the same stockwatering use, and there would be no interference with the processes of the national government in regulating private uses made on forest lands.

It appears that the United States is simply quarreling with the court's decision. The United States is also suggesting that the court disregard certain uncontested evidentiary findings and replace them with "judicial notice" of other alleged facts which would operate to change the result of the trial. As to the former approach the proper forum is the New Mexico Supreme Court, and as to the latter it is not only "a bit unusual," as the United State suggests, but a bit irregular. It should also be noted that such statements as 'every individual wanting to camp on forest lands would need to acquire a water right under state law' amount to nothing more than unfounded sensationalism. New Mexico law would require no such thing, and if need be we would be happy to stipulate that the rights of hunters, fishermen, hikers, and campers to the free use of the water of the public watercourses of the State of New Mexico on forest lands would in no way be qualified or interfered with by virtue of the proposed order.

In conclusion we would urge the adoption of New Mexico's proposed order modifying the master's findings and conclusions in accordance with the court's decision. The order comports with that decision, and it is clear that the United

States is not really quarreling with the form of the order, but rather with the merits of the decision.

Sincerely,

RICHARD A. SIMMS
Special Assistant Attorney General

[Filed in State District Court June 4, 1976]

**ORDER SUSTAINING OBJECTIONS AND
MODIFYING FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T.

17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.

- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.

2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

Location Sec., T., R.	U.S. Government Identification Number	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	200	2.21	Stockwater	1-1-1907
— 16S 9W	206	.51	Stockwater	1-1-1907
4 16S 9W	207	.01	Domestic Residential	7-21-1905
— 16S 9W	225	3.09	Stockwater	1-1-1907
16 19S 9W	226	.03	Domestic	7-21-1905
18 16S 9W	229	.03	Domestic	7-21-1905
18 16S 9W	230	.03	Domestic	7-21-1905
19 16S 9W	231	.01	Domestic	7-21-1905
— 16S 10W	249	1.00	Stockwater	1-1-1907
— 17S 9W	264	3.52	Stockwater	1-1-1907
— 17S 9W	281	3.21	Stockwater	1-1-1907
— 18S 9W	283	0.98	Stockwater	1-1-1907
— 18S 9W	307	3.57	Stockwater	1-1-1907
— 14S 10W	500	9.11	Stockwater	1-1-1907
28 14S 11W	523	2.50	Stockwater	1-1-1907
35 14S 10W	535	.02	Domestic Residential	3-2-1899
35 14S 10W	536	.02	Stockwater	1-1-1907
— 15S 11W	544	6.97	Stockwater	1-1-1907
— — —	588	8.82	Stockwater	1-1-1907

Location Sec., T., R.	U.S. Government Identification Number	Acre Feet Per Annum	Purpose	Priority
— 16S 10W	587	12.65	Stockwater	1-1-1907
31 15S 11W	614	3.00	Domestic	3-2-1899
7 16S 11W	639	6.87	Domestic Residential	5-9-1910
— 16S 12W	668	1.89	Stockwater	1-1-1907
— 16S 11W	674	2.94	Stockwater	1-1-1907
— 17S 12W	689	1.09	Stockwater	1-1-1907
— 17S 12W	698	4.94	Stockwater	1-1-1907
— 16S 12W	726	.63	Stockwater	1-1-1907
7 16S 13W	800	.51	Stockwater	1-1-1907
— 17S 13W	804	2.64	Stockwater	1-1-1907
— — —	881	6.50	Roadwater	1905
10 17S 16W	901	0.12	Domestic	1908
— 12S 15W	907	1.65	Stockwater	1-1-1907
17 17S 14W	946	.01	Domestic	1908
		Total	91.08	

3. That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to a point thirteen chains south of the north line of the southwest $\frac{1}{4}$ of Section 10; thence east to the west line of northeast $\frac{1}{4}$ of southwest corner of same; thence east along the south line of same and along south line of northwest $\frac{1}{4}$ of southeast $\frac{1}{4}$ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast $\frac{1}{4}$ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom,

four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

4. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U.S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.

5. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

6. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S. $29^{\circ}43'E.$, 37.30 ft. to Cor. No. 1-B; thence N. $60^{\circ}17'E.$, 21.25 ft. to Cor. No. 1-C; thence N. $29^{\circ}43'W.$, 24.65 ft. to Cor. No. 1-B; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S. $18^{\circ}30'E.$, 2380.00 ft. to Cor. No. 3; thence S. $47^{\circ}59'W.$, 1573.40 ft. to Cor. No. 4; thence S. $23^{\circ}00'W.$, 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 6.15.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S. $89^{\circ}03'W.$, 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and

distances; N. $28^{\circ}13'W.$, 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a $7^{\circ}50'$ curve to the left (chord bearing and distance N. $45^{\circ}54'W.$, 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence N. $1^{\circ}43'W.$, 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears N. $75^{\circ}30'W.$, 949.62 ft. dist.; thence S. $80^{\circ}00'E.$, 669.00 ft. to the Northeast Cor., thence S. $9^{\circ}55'W.$, 960 ft. to the Southeast Cor.; thence N. $81^{\circ}00'W.$, 669.00 ft. to the Southwest Cor.; thence N. $9^{\circ}57'E.$, 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriate right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were

or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

DONE this 26th day of March, 1976.

/s/ Hon. Norman Hodges
HON. NORMAN HODGES
District Judge

[Filed in State District Court July 2, 1976]

NOTICE OF APPEAL

Notice is hereby given that the DEPARTMENT OF AGRICULTURE FOREST SERVICE, one of the defendants herein, hereby appeals to the Supreme Court of New Mexico from the Order Sustaining Objections And Modifying Findings of Fact And Conclusions of Law entered in cause No. 6326 on June 3, 1976.

VICTOR R. ORTEGA
United States Attorney

/s/ James B. Grant
JAMES B. GRANT
Assistant U.S. Attorney

[Filed in State District Court July 2, 1976]

TO: J. WAYNE WOODBURY
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YOU AND EACH OF YOU will please take notice that on the 30th day of June, 1976, the defendant DEPARTMENT OF AGRICULTURE FOREST SERVICE, by filing a Notice of Appeal, a copy of which is attached hereto, took an appeal from the Order Sustaining Objections And Modifying Findings of Fact And Conclusions Of Law entered in cause No. 6326 on June 3, 1976.

VICTOR R. ORTEGA
United States Attorney

/s/ James B. Grant
JAMES B. GRANT
Assistant U.S. Attorney

PROOF OF SERVICE

I, the undersigned, do hereby certify that on the 30th day of June, 1976 I mailed a copy of the foregoing pleading to the above-named attorneys at the address indicated herein.

/s/ James B. Grant
JAMES B. GRANT
Assistant U.S. Attorney

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,094

MIMBRES VALLEY IRRIGATION CO.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Norman Hodges, District Judge

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953, Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water

rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e) (2) ¹, objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in *United States v. Winters*, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the *Winters* case has been subject to inconclusive debate through the years. It was further clarified, however, in *Arizona v. California*, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the *Winters* doctrine, and for the first time

¹ Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601:

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In *Cappeart v. United States*, 426 U.S. 128 (1976), the Court stated:

[W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created (Citations omitted.)

426 U.S. at 139.

The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more (Citation omitted.)

Id. at 141.

The *Cappeart* decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in *Arizona v. California*² concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the *Cappeart* Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the *Creative Act* of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the *Organic Act* of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 *Nat.Res.Law.* 503 (1974). The pertinent provision of that Act reads as follows:

² 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.

§ 475. Purposes For Which National Forests May Be Established And Administered.

... No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, recreational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed

protection or timber preservation, those secondary uses would not be permitted to continue. *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911); *United States v. Hunt*, 19 F.2d 634 (N.D. Ariz. 1927); *Honchok v. Hardin*, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not expand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

"The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

....

[F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service . . .

522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the

Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Justice

/s/ Mack Easley
MACK EASLEY
Justice

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
LUNA COUNTY

Monday, May 23, 1977

No. 11,094

MIMBRES VALLEY IRRIGATION Co.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,

STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE.

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is here-

by remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

SUPREME COURT OF THE UNITED STATES

No. A-139

UNITED STATES, PETITIONER,

v.

NEW MEXICO

 ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel
for petitioner,

IT IS ORDERED that the time for filing a petition
for writ of certiorari in the above-entitled cause be, and
the same is hereby, extended to and including October 3,
1977.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of August, 1977.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-510

UNITED STATES, PETITIONER,

v.

NEW MEXICO

ORDER ALLOWING CERTIORARI

Filed January 9, 1978

The petition herein for a writ of certiorari to the
Supreme Court of the State of New Mexico is granted.

No. 77-510

Supreme Court, U.S.

FILED

NOV 28 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF OF THE STATE OF
NEW MEXICO IN OPPOSITION

TONEY ANAYA,
Attorney General of New Mexico

RICHARD A. SIMMS,
Special Assistant Attorney General

Bataan Memorial Building
Santa Fe, New Mexico 87503

November 25, 1977

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IN THE
Supreme Court of the United States

October Term, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF OF THE STATE OF
NEW MEXICO IN OPPOSITION

The State of New Mexico does not disagree with the statements of the petitioner pursuant to Rules 40(a) and (b) of the Rules of the Supreme Court.

I. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States not only with rights to the use of that amount of water implicitly necessary to satisfy the purposes for which

the Gila National Forest lands were withdrawn from the public domain, but also provides the United States with rights to the use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Secretary of Agriculture?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain?

II. STATUTORY PROVISIONS

Act of July 26, 1866 Ch. 262 §9, 14 Stat. 253, 43 U.S.C. §661 (1952); Act of July 9, 1870, Ch. 235 §17, 16 Stat. 218, 30 U.S.C. §52 (1964); Creative Act of March 3, 1891, Ch. 561 §24, 26 Stat. 1103, 16 U.S.C. §471 (1964); Desert Land Act of 1877, Ch. 107 §1, 19 Stat. 377 (orig.), as amended 43 U.S.C. §321 (1962); Organic Administration Act of June 4, 1897, Ch. 251, 30 Stat. 34, 36, 16 U.S.C. §§475, 478 and 481; Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §528 (1960). Pertinent text is set forth in Appendix E, pp. 35a to 40a.

III. STATEMENT OF THE CASE

This case deals with the nature and extent of the United States' water rights implicitly reserved for the Gila National Forest pursuant to withdrawals of lands from the public domain under the Organic Administration Act of June 4, 1897. In its statement of the case the United States has misrepresented its presentation to the New Mexico courts of its reserved water right claims:

In the proceedings before the special master, the United States specified three purposes of the Gila National Forest

for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national forest to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest. . . ." (Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, pp. 3-4).

The evidentiary presentation is misrepresented in two ways. Most importantly no evidence was tendered relating to a need for an adjudicated right to minimum instream flows to enable the Forest Service to protect the forest from fire and erosion. In its inventory of claimed reserved water rights the Forest Service listed three minimum instream flows of 2 cfs each for "fish purposes." At trial it was stated that the claimed water uses were needed only to protect a rare and endangered species of trout indigenous to the Gila National Forest. (Transcript of Record, p. 535 and p. 566).

Secondly, the United States never specified the purpose of "recreational use incidental to hiking, fishing, camping, and hunting. . . ." Based upon the naive assumption that Congress had authorized the creation of national forests for the purpose of providing areas for hiking, fishing, camping, and hunting, counsel for the State of New Mexico mistakenly expressed a willingness in a brief before the Special Master to recognize reserved water rights for such purposes.¹ The United States' claims for reserved water rights for recreational uses

1. As the United States has noted, the concession resulting from counsel's mistake was 'repudiated' when the matter was heard by the district court. Whether the Gila National Forest was reserved from the public domain for recreational purposes was thoroughly argued before the district court and New Mexico Supreme Court.

went far beyond the diminutive amounts of water used by hikers, campers, fishermen, and hunters. Despite the over-appropriated condition of the Rio Mimbres, the Forest Service asserted claims for sufficient reserved water rights to create and maintain four recreational lakes and related facilities (Transcript of Record, pp. 538-565).

The United States' statement of the case is also incorrect with respect to the Special Master's findings and conclusions. The Special Master did not recognize reserved water rights for fire protection, erosion control, and stock grazing, as the Solicitor General states.² (Petition, p. 4). On the contrary, in this respect the Master recognized:

9) [where water uses had been made for grazing by private individuals] under permit of the United States Forest Service, and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.

10) In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786,³ and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as

2. It should be emphasized that there is no evidence in the record in support of the need for reserved water rights for fire protection or erosion control. No such claims were made. No reserved right is needed to divert water to put out forest fires, and the United States did not introduce evidence relating to erosion or potential erosion in the stretches of mountain stream wherein the minimum instream flows were claimed for "fish purposes."

3. These are the three minimum instream flows thought necessary to protect the endangered species of Gila trout.

more particularly described above. (Master's Findings of Fact & Conclusions of Law, App. D, p. 33a).

Essentially, the Special Master agreed with the State of New Mexico in his Findings of Fact and Conclusions of Law. In the district court, however, New Mexico objected to the Master's statement that the water rights arising out of non-governmental uses should be adjudicated to the permittees only when "the permit requires that the use be undertaken in compliance with state law. . . ." New Mexico also objected to the Master's recognition of minimum instream flows for "fish purposes," albeit that the Master stated that such rights could be recognized only when their exercise would not interfere with an upstream, junior appropriator under state law.

On June 4 1976, the district court entered its order sustaining New Mexico's objections to the Master's Report. (App. C, pp. 14a-21a). The New Mexico Supreme Court affirmed, holding that the United States has reserved water for the Gila National Forest sufficient to satisfy the purposes for which the forest lands were reserved and withdrawn from the public domain. Those lands, the court concluded, were not and lawfully could not have been withdrawn from the public domain for "fish purposes" and recreation prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960. (App. E, p. 38a).

IV. REASONS FOR DENYING THE WRIT.

1. The New Mexico Supreme Court's decision correctly applies the reservation doctrine to the withdrawals of the Gila National Forest lands from the public domain pursuant to the Organic Administration Act of June 4, 1897.

The United States distorts and hyperbolizes the significance of the New Mexico Supreme Court's decision, concluding that

it "has cut off water to 7,793,195 acres of national forest within [New Mexico]. . . ." (Petition, p. 6). It is urged that the decision "will threaten the ecology" and "impede husbandry." (Id., p. 6). The fish and wildlife will die. Aesthetic and recreational values have been smothered. Unwittingly, according to the United States, New Mexico has cut its own throat.

Sensationalism aside, the record shows that the decision of the New Mexico Supreme Court has not denied any claim of the United States for reserved water rights to protect and improve the Gila National Forest to secure favorable conditions of water flow and to furnish a continuous supply of timber. The decision does not require "each stockowner holding a federal grazing permit to obtain an individual adjudication of his . . . water rights under state law," thus, as the Solicitor argues, placing "an unreasonable burden on federal range management and impair[ing] federal control of federal lands."⁴ (Petition, p. 19). Most importantly the decision is not a denial of federal reserved water rights for recreation and the maintenance of minimum instream flows for the preservation of an endangered species of fish; noting the value of such rights, the New Mexico Supreme Court simply refused to give credence to the argument that they can be predicated upon the purposes for which

4. The district court's decision provides for the adjudication of rights to permittees when the facts will show that the water uses have been made by them instead of the Forest Service. With respect to stockwater New Mexico law provides that up to 10 acre feet may be impounded without the necessity of obtaining a permit. Of the 22 claims to water rights for stock watering purposes made by the United States, none would require an impoundment of more than 10 acre feet. Cf., App. D pp. 26a-27a. New Mexico law places no limit on annual consumption from such impoundments, and stockwater rights in any event are not within the embrace of the pleadings below. If any administrative burden would arise, it would not be by the decision of the New Mexico Supreme Court, but rather by the unnecessary adjudication of stockwater rights sought by the United States. The provision in the district court's order would not affect stock watering, grazing, or range management. It is designed to embrace such significant water uses as might be made with respect to a ski resort or mining operation.

national forest lands can be lawfully withdrawn from the public domain.

There is no quarrel with the reservation doctrine. The New Mexico Supreme Court recognizes that "[t]his Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." [*Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, — L.Ed. 2d — (1976)]. The question relates to the application of the doctrine to withdrawals of land for national forests:

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated. . . water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. . . . The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. (Id., p. 141).

In light of the reservation doctrine as defined and developed by this Court, the New Mexico Supreme Court determined that the United States' reserved water rights in the Rio Mimbres drainage for the Gila National Forest were limited to the purposes set out in the Organic Administration Act of 1897, 16 U.S.C. §475:

Purposes For Which National Forest May Be Established and Administered.

* * * No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flow, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it

is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the minerals therein or for agricultural purposes, than for forest purposes.

The court concluded that "(t)he Act limits the purpose for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." (Decision of the New Mexico Supreme Court, App. A, p. 6a). In the United States' Petition the Solicitor General asserts that the New Mexico Supreme Court "discarded without explanation, the first purpose," and concluded, "again without explanation, that neither purpose encompassed use of water for recreation or for maintenance of minimum instream flows." (p. 10). The Solicitor does not point out, however, that the New Mexico Supreme Court, as well as the district court and the Special Master — all of whom agreed on the purposes for which the forest lands could have been withdrawn — reached their decisions after a copious review of the legislative history of the Creative Act of 1891 and the Organic Administration Act of 1897. The legislative history shows unequivocally that the object of "improving and protecting the forest" is a generic statement facilitating the establishment of a forest for the purposes of maximizing the water yield for appropriators under state law and insuring a continuous supply of timber and other forest products for the rapidly growing western states.

All of the committee reports, studies, and correspondence support the decision below. For example, the "Report of the Committee upon the Inauguration of the Forest Policy" (Sen. Doc. No. 105, 55th Cong., 1st Sess. 1897), which precipitated the Organic Administration Act, discussed the twofold principle as follows:

The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century

Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. (p. 36).⁵

The weakness of the United States' argument in this regard is illustrated by the fact that in its five briefs before the New Mexico courts only two pages were devoted to a discussion of the legislative history of the two Acts. The reason, of course, is that none of the history supports the United States' position. New Mexico, on the other hand, devoted thirty-five pages to a discussion of the relevant history.⁶

5. The United States has suggested that the fact that the Rio Mimbres adjudication is in state court is the cause of "the mischief" below. It should be noted, however, that there are pending seven similar general adjudications in federal district court in New Mexico, where exactly the same issues have been argued. The decisions of the federal district court with respect to instream flows, recreation, and permittee uses are the same in substance as the state court decisions.

6. Instead of discussing the actual legislative history the United States has repeatedly referred to the subsequent writings of B. E. Fernow, the first Chief of the Forestry Division of the Department of Agriculture, and in discussing the actual language of the two acts in question the United States has avoided the legislative history and sought to exploit certain phrases out of context. For instance, in quoting §24 of the Creative Act of 1891 in its Petition (p.13), the Solicitor General isolates the clause that makes it possible to reserve forest lands having no commercial value.

Sec. 24. The President of the United States of America may, from time to time, set apart and reserve, in any State or Territory having public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forest, and the

Unable to persuade either the state or federal courts that the history of the relevant legislation supports the proposition that recreation and wildlife protection were valid purposes for which forest lands might have been withdrawn from the public domain before the passage of the Multiple-Use Sustained-Yield Act of June 12, 1960, the United States has argued that reserved rights for these purposes arise under the regulatory provisions of the Organic Administration Act. That the government's logic is in error can be seen in its analysis of the case law dealing with its authority to regulate such activities. For example, in its brief in *State of New Mexico, ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America*, (Civil No. 9780 U.S.D.C., N.M.), the United States argued as follows:

6. (Cont'd)

President shall by public proclamation declare the establishment of such forest and the limits thereof. (Tr. 307).

The United States then alludes to Fernow's *Report of the Chief of the Division of Forestry* (1891), noting his belief that the secondary objects of the forests were aesthetic and recreational. The conclusion the government draws, however, is that because the forests need not be of commercial value and because Fernow wanted to encourage hunting and fishing, "uses of the National Forests involving instream uses and requiring a continued adequate flow of water were considered and implemented." (Transcript of Report, p 309). However, as is clear from a reading of the legislation and its history, there is a less extraordinary explanation of the fact that the forest reserves need not be of commercial value, viz., that the lands were reserved not only for the preservation of economically valuable timber, but also to preserve and manage the watershed in order to ensure a dependable water supply. Prudent watershed management, of course, is desirable wherever it might protect the downstream appropriators from uncontrolled, capricious runoff — regardless of whether the watershed timber has any commercial value. In other words, from the fact that the Creative Act authorized the reservation of forest lands having no commercial value we should not conclude that some forests are reserved for recreation and of necessity must be judicially assured of reserved rights to minimum flows and recreational uses. On the contrary, we should conclude from the express provisions of the Organic Act that all forests were reserved pursuant to existing statutory authority for the protection of downstream water users, and not in order to protect the proprietary interests of the United States in derogation of the rights of others. There is no secondary or supplemental purpose listed in the Act, and none was authorized until the Multiple-Use Sustained-Yield Act of June 12 1960.

The opinion in *McMichael v. United States of America*, 335 F. 2d 283 (9th Cir. 1964) considered the very issue now before this court. In that case appellants argued that certain regulations establishing a wilderness area limiting the use of portions of a National Forest were not authorized under the Organic Administration Act of June 4, 1897. In upholding the regulation as a valid forest purpose the court stated:

The consistent administrative interpretation of the Act of June 4, 1897, however, has been that while recreational considerations alone will not support the establishment of a National Forest, *they are appropriate subjects for regulation*. Congress has tacitly shown its approval of this interpretation by appropriating the sums required for its effectuation. (Emphasis added) (355 F.2d at 285).

All the Ninth Circuit said, of course, was that the Secretary of Agriculture has the authority under §478 of the Act to make rules and regulations governing the use of wilderness. The court did not conclude, as the United States does, that "the regulation is a valid forest purpose" out of which reservation water rights can arise in behalf of the forest administrators.

Aside from its arguments relating to 16 U.S.C. §475 and 16 U.S.C. §478, the United States has also contended that 16 U.S.C. §551 indicates that Congress envisioned broader purposes for forest reservations than the express limitations found in §475. Section 551 reads as follows:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their

occupancy and use and to preserve the forests thereon from destruction.

In its brief before the New Mexico Supreme Court, the United States stated that "[o]bviously, 'occupancy and use' contemplate more than the two purposes identified by [New Mexico]." However, from the fact that the Secretary of Agriculture is empowered to regulate the many *uses* of forest lands it does not follow that the *purposes* for which national forest lands can be reserved are somehow expanded. On the contrary, it was to preserve the objects or purposes of the forests as they were enumerated in §475 that the Secretary was authorized to regulate occupancy and use.

The history of the legislation shows that the major deficiency of the Creative Act of 1891 was its failure to provide for the regulation of the forests once they were reserved, and it was largely for this reason that the Organic Administration Act of 1897 was passed. (Bassman, *The Organic Act of 1897. A Historical Perspective*, 3 Nat. Res. Law. 503 (1974); "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897). Section 551 was intended to remedy this deficiency. In order to insure that the purposes of watershed protection and timber preservation were not undermined or interfered with by the unrelated, but lawful activities in the forests, those activities had to be regulated: "... any person [may enter] upon such national forests for all proper and lawful purposes. . . , [provided that such persons] must comply with the rules and regulations" adopted under §551. (16 U.S.C. §478). Accordingly §551 was designed to regulate forest *uses*, and not to somehow equate forest uses with forest *purposes*. If we can draw any conclusion from the fact that §551 was included in the Act, it is that Congress was aware that many of the uses made of forest lands by private individuals might be

inconsistent with the purposes for which the forests were created. The cases which have dealt with §551 support this conclusion. For example, in *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land:

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* (Emphasis added)

Both the legislative history and the numerous cases construing the regulatory provisions of the Organic Administration Act, including the decisions of this Court, support the decision of the New Mexico Supreme Court. [See, e.g., *McMichael and Grimaud, supra*, and *Light v. United States*, 220 U.S. 523, 31 S. Ct. 485, 55 L.Ed. 570 (1911)]. Despite this inescapable conclusion, the United States has urged that a different result was reached in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1964).⁷ In his Report in that case, the Special Master, the Hon. Simon Rifkind, made reference to certain national forests, including the Gila National Forest in New Mexico, and found:

They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber, (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. . . . 8 (p. 96; The footnote is Rifkind's)

7. This argument has also been made in Civil No. 9780 in federal district court in New Mexico, *supra*, to no avail.

The footnote refers the reader to that portion of the transcript upon which Judge Rifkind was basing his finding, viz., two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Service. (*Arizona v. California*, Tr. pp. 16014-16015). A reading of Mr. Lyon's testimony clearly indicates that he was talking about forest *uses* and not the purposes for which forest lands could be withdrawn:

Q: Mr. Lyon, generally what are the uses which are made of the National Forests?

A: The National Forests are used for . . .
(Tr. 16014).

It is clear from the transcript that the question of whether recreation and other forest uses are valid forest purposes within the meaning of the Organic Act was neither litigated nor decided.

There are other reasons why *Arizona v. California* cannot be considered to have settled the question. In the opinion the Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

The decree ultimately adopted by the Supreme Court made no reference to the purposes for which national forests could be reserved, and the decree proposed by the Master did not specifically state the purposes of the national forests. While the Court

approved the preliminary findings of the Master, his proposed decree was not adopted and neither did the Court specifically adopt his findings and conclusions. In the decree that was adopted, the Court decreed to the Gila National Forest [in the Gila River drainage] reserved waters sufficient, "... to fulfill the purposes of the Gila National Forest. . . ." (*Arizona v. California, supra*, p. 349 U.S.). The purposes were not elaborated, just as they were not litigated, and this Court's holding, in effect, did no more than state the basis of the issue before the New Mexico Supreme Court in this action.

2. The New Mexico Supreme Court's decision does not interfere with the ability of the United States to perfect federally reserved water rights to protect wildlife, environmental, and aesthetic values.

The United States has also argued that this is really a wildlife case controlled by *Cappaert, supra*;

The forest is, among other things, the wildlife living within it. By denying minimum instream flows for wildlife protection and for the fish that require those amounts of water, the court ignored the relationships among the living things in the forest that preserve the ecological balance and keep the forest healthy. (p. 11).

Rhetoric, however, cannot change the meaning of the Organic Act. In *Cappaert*, the Cappaerts owned a 12,000 acre ranch near Devil's Hole, a limestone cavern reserved from the public domain as a National Monument in which there exists a small pool of water which supports a unique species of desert fish. The United States filed suit to enjoin the pumping of six of the Cappaerts' wells because the pumping was lowering the water level in Devil's Hole and endangering the fish. The question was whether the United States had a reserved water right to maintain the pool. The Court held that the United States did have a

reserved right "necessary to the purpose of the reservation; the purpose included preservation of the pool and the pupfish in it." (S.Ct. 2069).

There is no question in *Cappaert* whether the preservation of the pool and the fish was a purpose for which Devil's Hole could have been withdrawn from the public domain within the meaning of the National Park Service Act. (16 U.S.C. §§1-3). Section one of the Act reads as follows:

. . . the fundamental purpose of the said parks, monuments, and reservations [is] to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The answer to the question here was obvious in *Cappaert* — predicated upon the power to reserve lands for the specific purposes expressed in the Act, the United States had a right to preserve the pool "unimpaired" and to maintain "the wild life therein. . . ." If, however, Devil's Hole had been part of a reservation of forest lands under the authority of the Organic Administration Act, it is clear that the United States would have no reserved right:

The implied reservation of water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. . . . Here the purpose of reserving Devil's Hole Monument is preservation of the pool."

The purposes of watershed management and timber preservation would not have sufficed.

While the United States cannot properly predicate reserved water rights for recreation and "fish purposes" on withdrawals of land from the public domain under the Organic Administration Act of 1891, there are a number of ways in which such

rights could be established. The Forest Service could posit its claims under the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, which provides that as of 1960 national forests "shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes." If deemed important enough the United States could establish such rights by withdrawing the forest lands pursuant to the National Park Service Act, *supra*, or by executive order transferring the lands to the National Park Service for concurrent administration under the Act. The United States might also withdraw the beds and banks of the Rio Mimbres and its tributaries under the Wild and Scenic Rivers Act of October 2, 1968, 82 Stat. 906, 16 U.S.C. §1271, et. seq. In short, the New Mexico Supreme Court has not "jeopardized the reserved water rights of the United States in national forests throughout the West." (Petition, p. 6). This is not a case of a state court stubbornly ignoring environmental concerns. On the contrary, like many cases previously decided by this court and numerous circuit and federal district courts, this is a case dealing with the meaning of the Organic Administration Act of 1891.

3. The Petition is untimely.

At trial of the United States' claims for the Gila National Forest the government urged that the determination of its rights for future water uses be postponed until such time as an inventory of such rights could be completed. The district court responded as follows:

That in light of the right of the United States to water for future needs when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed

future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by §75-4-1 to 75-4-8 in N.M.S.A. 1953. (Conclusion No. 12, App. C, p. 21a).

There is now pending a motion before the district court to proceed with the adjudication of the United States' rights for future forest uses. All of the government's claims for water rights relating to watershed management and timber maintenance have not been adjudicated. Until those claims are known and determined a review by this Court would be premature.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,094

MIMBRES VALLEY IRRIGATION Co.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,

STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
Norman Hodges, District Judge

OPINION

PAYNE, Justice

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres

which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 66 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ. P. 53(e)(2)¹, objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for

¹ Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in *United States v. Winters*, 207 U.S. 564 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the *Winters* case has been subject to inconclusive debate through the years. It was further clarified, however, in *Arizona v. California*, 373 U.S. 546 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the *Winters* doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National

Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

373 U.S. at 601.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In *Cappeart v. United States*, 426 U.S. 128 (1976), the Court stated:

[W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created (Citations omitted.)

426 U.S. at 139.

The implied - reservation - of - water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more (Citation omitted.)

Id. at 141.

The *Cappeart* decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in *Arizona v. California*^{*} concludes that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the *Cappeart* Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamation dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

^{*} 376 U.S. 340, 350 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat.Res.Law. 503 (1974). The pertinent provision of that Act reads as follows:

§ 475. Purposes For Which National Forests
May Be Established And Administered.

... No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, rec-

reational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . ." 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911); *United States v. Hunt*, 19 F.2d 634 (N.D. Ariz. 1927); *Honchok v. Hardin*, 326 Fed. Supp. 988 (D. Md. 1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not ex-

pand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and,

as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

"The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

. . . .

[F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service

. . .

522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior

discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Justice

/s/ Mack Easley
MACK EASLEY
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
LUNA COUNTY

Monday, May 23, 1977

No. 11,094

MIMBRES VALLEY IRRIGATION Co.,
PLAINTIFF-APPELLEE,

vs.

TONY SALOPEK, ET AL., DEFENDANTS-APPELLEES,

vs.

DEPARTMENT OF AGRICULTURE FOREST SERVICE,
DEFENDANT-APPELLANT,
STATE OF NEW MEXICO,
PLAINTIFF-IN-INTERVENTION-APPELLEE.

This cause having heretofore been argued, submitted and taken under advisement, and the Court now being sufficiently advised in the premises announces its decision by Mr. Justice Payne, Mr. Justice Sosa and Mr. Justice Easley concurring, affirming the judgment of the trial court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Luna, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is hereby remanded to the said District Court of Luna County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

APPENDIX C

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,

STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed June 4, 1976]

ORDER SUSTAINING OBJECTIONS AND
MODIFYING FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on to be heard upon the Findings of Fact and Conclusions of Law of the Special Master, filed herein on May 2, 1975, and the State of New Mexico, plaintiff-in-intervention, having filed its Objections thereto on May 15, 1975, the parties having been heard on said Objections, and upon due deliberation and being fully advised,

IT IS ORDERED that the Objections are hereby sustained and that the Special Master's Findings of Fact and Conclusions are modified in accordance herewith, as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the requirements and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.

- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres Watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.: Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.
- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T.

- 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.
- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13, and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
- e. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W., Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.
- Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No.

9, a point of curve; thence Northwesterly on a $7^{\circ}50'$ curve to the left (chord bearing and distance $N.45^{\circ}54'W.$, 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE $\frac{1}{4}$, said Section 35; thence $N.1^{\circ}43'W.$, 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

7. That of that portion of the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE $\frac{1}{4}$, said Section 26, bears $N.75^{\circ}30'W.$, 949.62 ft. dist.; thence $S.80^{\circ}00'E.$, 669.00 ft. to the Northeast Cor., thence $S.9^{\circ}55'W.$, 960 ft. to the Southeast Cor., thence $N.81^{\circ}00'W.$, 669.00 ft. to the Southwest Cor.; thence $N.9^{\circ}57'E.$, 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

8. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of § 75-4-2 to 75-4-8 N.M.S.A., 1953.

2. That § 75-4-8 N.M.S.A., 1953, requires that the decree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."

3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.

4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding No. 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.

6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Find-

ing 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.

7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.

8. That in addition to the above-listed present uses made by the United States, or its permittees, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.

9. That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States.

10. That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreational purposes.

11. That the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain.

12. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year from the date of this order, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A. 1953.

DONE this 26th day of March, 1976.

/s/ Norman Hodges
HON. NORMAN HODGES
District Judge

APPENDIX D

IN THE DISTRICT COURT
OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF LUNA
STATE OF NEW MEXICO

No. 6326

MIMBRES VALLEY IRRIGATION CO., PLAINTIFF,

v.

TONY SALOPEK, ET AL., DEFENDANTS,
STATE OF NEW MEXICO, PLAINTIFF-IN-INTERVENTION.

[Filed May 5, 1975]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for hearing on October 9, 1973, and the Special Master having heard the evidence and argument of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the United States has reserved water rights to the extent necessary for the require-

ments and purposes of the reservations included in the following withdrawal orders:

- a. By presidential proclamation dated March 2, 1899, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: land located in Sections 23, 26, 27, 28, 32, 33, 34, and 35, T. 13S., R. 10W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 14S., R. 10W., N.M.P.M.; Sections 1, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36, T. 14S., R. 11W., N.M.P.M.; Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, T. 15S., R. 10W., N.M.P.M.; all sections in T. 15S., R. 11W., N.M.P.M.; and Sections 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35 and 36, T. 15S., R. 12W., N.M.P.M.
- b. By presidential proclamation dated July 21, 1905, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Section 31, T. 15S., R. 9W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21,

28, 29, 30, 31, 32, and 33, T. 16S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 35 and 36, T. 16S., R. 10W., N.M.P.M.; Sections 1, 2, 3, 4, 12, 18, 19, 30 and 31, T. 16S., R. 11W., N.M.P.M.; Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T. 16S., R. 12W., N.M.P.M.; Sections 13, 14, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, T. 16S., R. 13W., N.M.P.M.; Sections 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 28, 29, 33, 34, 35 and 36, T. 17S., R. 9W., N.M.P.M.; Section 1, T. 17S., R. 10W., N.M.P.M.; Sections 6, 7 and 18, T. 17S., R. 11W., N.M.P.M.; Sections 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 17, 18, and 19, T. 17S., R. 12W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11 and 12, T. 17S., R. 13W., N.M.P.M.; and Sections 3, 4 and 5, T. 17S., R. 14W., N.M.P.M.

- c. By presidential proclamation dated February 6, 1907, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 32 and 33, T. 19S., R. 15W., N.M.P.M. and Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20 and 30 of T. 20S., R. 15W., N.M.P.M.

- d. By presidential proclamation dated June 18, 1908, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands in Section 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32, 33 and 34, T. 16S., R. 10W., N.M.P.M.; Sections 10, 11, 13 and 24, T. 16S., R. 11W., N.M.P.M.; Sections 2, 3, 10, 11, 12, 13 and 14, T. 17S., R. 10W., N.M.P.M.; Sections 7, 8, 9, 10, 17, 18, 19, 20, 29, and 30, T. 17S., R. 14W., N.M.P.M. and Sections 12, 13, 14, 24 and 25, T. 17S., R. 15W., N.M.P.M.
3. By presidential proclamation dated May 9, 1910, the following Gila National Forest lands within the Rio Mimbres watershed were withdrawn and reserved for national forest purposes: lands located in Sections 5, 6, 7, 8 and 9, T. 16S., R. 11W., N.M.P.M.; Sections 5, 8 and 17, T. 17S., R. 11W., N.M.P.M.; Sections 19, 30, 31, and 32, T. 17S., R. 9W., N.M.P.M.; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16, T. 18S., R. 9W.; Sections 5, 6, 7, 8, 9, 17, 18, T. 18S., R. 8W., N.M.P.M.
2. As of December 27, 1972, the following national forest uses have been made either by the United States or its permittees in the Mimbres River Watershed within the Gila National Forest:

26a

Location Sec., T., R.	U.S. Govern- ment Identifi- cation Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
1 15S 11W	024	2.00		Fish	3- 2-1899
— 16S 10W	200		2.21	Stockwater	7-21-1905
— 16S 9W	206		.51	Stockwater	7-21-1905
4 16S 9W	207		.01	Domestic	
				Residential	7-21-1905
— 16S 9W	225		3.09	Stockwater	7-21-1905
16 19S 9W	226		.03	Domestic	
				Recreational	7-21-1905
18 16S 9W	229		.03	Domestic	
				Recreational	7-21-1905
18 16S 9W	230		.03	Domestic	
				Recreational	7-21-1905
19 16S 9W	231		.01	Domestic	
				Recreational	7-21-1905
— 16S 10W	249		1.00	Stockwater	6-18-1908
— 17S 9W	264		3.52	Stockwater	7-21-1905
— 17S 9W	281		3.21	Stockwater	7-21-1905
— 18S 9W	283		0.98	Stockwater	1910
— 18S 9W	307		3.57	Stockwater	5-9-1910
— 14S 10W	500		9.11	Stockwater	3-2-1899
27 14S 11W	511	2.00		Fish	3-2-1899
28 14S 11W	523		2.50	Stockwater	3-2-1899
35 14S 10N	535		.02	Domestic	
				Residential	3-2-1899
35 14S 10W	536		.02	Stockwater	3-2-1899
— 15S 11W	544		6.97	Stockwater	3-2-1899
— — —	588		8.82	Stockwater	3-2-1899
— 16S 10W	587		12.65	Stockwater	3-2-1899
31 15S 11W	614		3.00	Domestic	
				Recreational	3-2-1899
7 16S 11W	639		6.87	Domestic	
				Residential	5-9-1910
— 16S 12W	668		1.89	Stockwater	7-21-1905
— 16S 11W	674		2.94	Stockwater	7-21-1905
— 17S 12W	689		1.09	Stockwater	7-21-1905
— 17S 12W	698		4.94	Stockwater	7-21-1905
— 16S 12W	726		.63	Stockwater	7-21-1905
1 15S 11W	786	2.00		Fish	3-2-1899
7 16S 13W	800		.51	Stockwater	7-21-1905
— 17S 13W	804		2.64	Stockwater	3-2-1899
— — —	881		6.50	Roadwater	1905
10 17S 16W	901		0.12	Domestic	1908

27a

Location Sec., T., R.	U.S. Govern- ment Identifi- cation Number	Cubic Feet Per Second	Acre Feet Per Annum	Purpose	Priority
17 17S 14W	904		.10	Wildlife	6-18-1908
— 12S 15W	907		1.65	Stockwater	2-6-1907
17 17S 14W	946		.01	Domestic	1908

Total 6.00 91.18

- That there are no private junior appropriators upstream of the above-listed instream uses numbered 024, 511, and 786.
- That said instream uses numbered 024, 511, and 786 can be made without raising the possibility of interference with the rights of junior upstream appropriators.
- That said instream uses numbered 024, 511, and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators.
- That the United States owns lands as follows which were reserved for military use as the Ft. Bayard Military Reservation on April 16, 1869: Beginning at a point on the east line of R. 13W., New Mexico Meridian, seven chains north of the south line of T. 17S.; thence running west parallel to and seven chains north of said tract line, three miles, more or less, to a point on the west line of Section 34; thence north along the west line of Sections 34, 27, 22, 15 and 10 to

a point thirteen chains south of the north line of the southwest $\frac{1}{4}$ of Section 10; thence east to the west line of northeast $\frac{1}{4}$ of southwest corner of same; thence east along the south line of same and along south line of northwest $\frac{1}{4}$ of southeast $\frac{1}{4}$ of Section 10 to the southeast corner of same; thence north along the same to a point thirteen chains south of north line southeast $\frac{1}{4}$ of Section 10; thence east parallel to and thirteen chains south of north line of said quarter section and of south halves of Sections 11 and 12 to the east line of R. 13W.; thence continue east, on same course, 20.80 chains to the northeast corner of the reservation; thence south to said range line and 20.80 chains east therefrom, four and one-fourth miles, more or less, to a point seven chains north of township line; thence west to the point of beginning, containing approximately 8,840 acres.

7. That on January 2, 1941, all of the lands of the Ft. Bayard Military Reservation except the SE $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35, and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M., were transferred to the U. S. Department of Agriculture, and by virtue of said transfer were no longer used for military purposes.
8. That since January 2, 1941, all of the lands once comprising the Ft. Bayard Military Reservation except the SW $\frac{1}{4}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, the NE $\frac{1}{4}$ of Section 35,

and the NW $\frac{1}{4}$ of Section 36, all in T. 17S., R. 13W., N.M.P.M. have been used for forest purposes.

9. That on July 1, 1966, the United States conveyed to the State of New Mexico the following described lands, formerly included within the Ft. Bayard Military Reservation and later transferred to the United States Department of Agriculture:

All that part of the SW $\frac{1}{4}$, Section 25; SE $\frac{1}{4}$, Section 26; NE $\frac{1}{4}$, Section 35; and NW $\frac{1}{4}$, Section 36, all in T. 17S., R. 13W., N.M.P.M., Grant County, New Mexico, described as follows: Beginning at Cor. No. 1, which is identical with the Northwest corner of the SE $\frac{1}{4}$, said Section 26; thence East 1456.34 ft. to Cor. No. 1-A; thence S.29° 43'E., 37.30 ft. to Cor. No. 1-B; thence N. 60°17'E., 21.25 ft. to Cor. No. 1-C; thence N.29°43'W., 24.65 ft. to Cor. No. 1-D; thence East, 2836.62 ft. to Cor. No. 2; on the North line of the SW $\frac{1}{4}$, said Section 25; thence S.18°30'E., 2380.00 ft. to Cor. No. 3; thence S.47°59'W., 1573.40 ft. to Cor. No. 4; thence S.23°00'W., 1450.00 ft. to Cor. No. 5; thence East, 400.00 ft. to Cor. No. 6; thence South, 615.00 ft. to Cor. No. 7 on the South line of the NW $\frac{1}{4}$, said Section 36; thence S.89° 03'W., 2504.57 ft. to Cor. No. 8 on the South line of the NE $\frac{1}{4}$, said Section 35 and in the

center-line of former U.S. Highway No. 260; thence following the center-line of said highway the following courses and distances; N.28°13'W., 1098.80 ft. to Cor. No. 9, a point of curve; thence Northwesterly on a 7°50' curve to the left (chord bearing and distance N.45°54'W., 451.00 Ft.) 460.66 ft. to Cor. No. 10, on the West line of the NE 1/4, said Section 35; thence N.1°43'W., 3493.49 ft. to the place of beginning. Containing 482.824 acres, more or less.

10. That of that portion of the SW 1/4 of Section 25, the SE 1/4 of Section 26, the NE 1/4 of Section 35, and the NW 1/4 of Section 36, all in T. 17S., R. 13W., N.M.P.M., not conveyed to the State of New Mexico, the following described property is administered by the Veterans Administration as a military cemetery:

Beginning at the Northwest Cor. at a point whence the Northwest Cor. of the SE 1/4, said Section 26, bears N.75°30'W., 949.62 ft. dist.; thence S.80°00'E., 669.00 ft. to the Northeast Cor., thence S.9°55'W., 960 ft. to the Southeast Cor.; thence N.81°00'W., 669.00 ft. to the Southwest Cor.; thence N.9°57'E., 972.00 ft. to the place of beginning. Containing 14.833 acres, more or less.

11. That the projected future needs of the reserved lands of the United States specified above are significant and substantial in quantity as com-

pared to present uses and not in the category of minor, modest, or insignificant in amount.

12. In addition to the reserved rights described herein the United States has an appropriative right on certain acquired lands to the extent of 3 acre feet per annum from a well located in Sec. 26, T. 19S., R. 13W., known as the Airport Well. The use of said right may exceed 3 acre feet in any given year provided the total use over any 10 calendar year period does not exceed 30 acre feet.

CONCLUSIONS OF LAW

1. That this is a water adjudication case brought under the provisions of §§ 75-4-2 to 75-4-8 N.M.S.A., 1953.
2. That § 75-4-8 N.M.S.A., 1953, requires that the degree to be entered in every water adjudication case "shall . . . declare, as to the water adjudged to each party, the priority, amount, purpose, period, and place of use . . ."
3. That this court has jurisdiction to adjudicate the water rights of the United States herein by virtue of the McCarran Amendment, 43 U.S.C.A. § 666.
4. That the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain.

5. That the water uses necessary for military purposes on the lands of Ft. Bayard Military Reservation as found in Finding 4, when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and all other uses originated thereafter were for forest purposes with a priority date of January 2, 1941.
6. That the water rights appurtenant to the lands of the Ft. Bayard Military Reservation and transferred to the State of New Mexico as found in Finding 6, pursuant to Stipulation of the parties are to be used for the hospital and purposes incidental thereto and connected therewith, with a priority date of the actual appropriation and placing to beneficial use, which was 1899.
7. In respect to that portion of the Ft. Bayard Military Reservation which is still extant and is being administered by the Veterans Administration as a military cemetery, the United States owns water rights with a priority date of April 16, 1869, for the requirements and purposes of the said cemetery.
8. That in addition to the above-listed present uses adjudicated to the United States, the United States is entitled to have adjudicated to it such additional rights as may be necessary for the purposes for which withdrawn, with a priority date as of the withdrawal, but such

- additional uses should be limited to the amount sufficient for the future requirements for the purposes of the withdrawal.
9. That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States.
 10. In view of the fact that there are no private junior appropriators upstream of the instream uses numbered 024, 511, and 786, and consequently, because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs, as more particularly described above.
 11. That among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.
 12. That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 (74 Stat. 215, 16 U.S.C. § 528), no Act of Congress

authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses.

13. That in light of the right of the United States to water for future needs, when considered with the necessity of finally adjudicating the rights of the United States, and the fact that the United States is not yet prepared to specify such future needs, the United States shall, within one year after the order is entered on this report, specify the priority, amount, purpose and periods and place of use of all such claimed future requirements, following which 30 days' notice of the same shall be given to the State of New Mexico and other parties herein shall have the right to object to any or all of such claims, and a hearing shall be had before the Special Master following which the rights of the United States shall be finally adjudicated as required by § 75-4-1 to 75-4-8 in N.M.S.A., 1953.

IT IS SO ORDERED.

IRWIN S. MOISE
Special Master

May 2, 1975.

APPENDIX E

STATUTES INVOLVED

Act of July 26, 1866, Ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661 (1952):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. . . .

. . . Sec. 9. *And be it further enacted,* That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

Act of July 9, 1870, Ch. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52 (1964):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six,

eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act. . . .

. . . Sec. 17. *And be it further enacted*, That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. . . .

Creative Act of March 3, 1891, Ch. 561 § 24, 26 Stat. 1103, 16 U.S.C. §471 (1974):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,'" approved June fourteen, eighteen hundred and seventy eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby, repealed: . . .

. . . Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation,

declare the establishment of such reservations and the limits thereof.

Organic Administration Act of June 4, 1897, Ch. 2 §1, 30 Stat. 34, 16 U.S.C. §475, Ch. 2 §1, 30 Stat. 36, 16 U.S.C. §§478 & 481 (1974):

. . . All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. . . . (§ 475)

. . . Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything herein prohibit any person from entering upon such national forests

for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests. . . . (§ 478)

. . . All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder. (§ 481)

Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

Sec. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple

use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

Sec. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

Sec. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the

national forests without impairment of the productivity of the land.

Sec. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

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IN THE
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October Term, 1977

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

SUPPLEMENTAL BRIEF OF THE STATE
OF NEW MEXICO IN OPPOSITION

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In its Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico the United States asserted that:

(i)n the proceedings before the special master, the United States specified three purposes of the Gila National Forest for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national forest to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest. . .

In New Mexico's brief in opposition it was stated that "(i)n its statement of the case the United States has misrepresented

its presentation to the New Mexico courts of its reserved water right claims. . . ." (p.2). Elaborating on the statement, we said:

The evidentiary presentation is misrepresented in two ways. Most importantly no evidence was tendered relating to a need for an adjudicated right to minimum instream flows to enable the Forest Service to protect the forest from fire and erosion. In its inventory of claimed reserved water rights the Forest Service listed three minimum instream flows of 2 cfs each for "fish purposes." At trial it was stated that the claimed water uses were needed only to protect a rare and endangered species of trout indigenous to the Gila National Forest. (Transcript of Record, p. 535 and p. 566).

In reply, the Solicitor General has stated that New Mexico's statement "is incorrect," because:

(a)s the United States pointed out before the district court (Tr. of Record 373-375), the special master took judicial notice that live streams not only support fish life but serve other valid forest purposes, including erosion control, fire protection, watershed protection, and wildlife habitat protection. (Reply Memorandum for the United States, pp. 2-3).

Following this statement in a footnote, the Solicitor concluded that "(t)hus, there is no merit to respondent's contention that the special master recognized the United States' right to minimum instream flows for 'fish' purposes only." (Id., p. 3).

The reference to the Transcript of Record upon which the United States relies is to pages 374-376, which are pages 3-6 of one of the government's memorandum briefs entitled "Objections to Proposed Order Submitted by State Engineer Sustaining Objections and Modifying Findings of Fact and Conclusions of Law." In that brief the United States made the same statement that was made in the Reply Memorandum on petition to this Court, viz.:

The Special Master stated, at the final hearing held by him on the validity of the United States' claims for rights to instream uses to maintain minimum flows for valid forest purposes, that he could judicially notice that these live

streams not only supported fish life but served other valid forest purposes such as erosion control, fire protection, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, aesthetics, etc.

A review of the actual evidentiary hearing and transcript of record, however, shows that the instream uses were claimed to be needed only to protect a species of trout indigenous to the Gila National Forest and that the Master did not recognize the claimed flows for any other purpose. (Transcript of Record, pp. 468-592, esp. p. 535 and p. 566). The Special Master *did not* judicially notice that erosion control, fire protection, or watershed protection required the recognition of rights to minimum instream flows. At a hearing subsequent to trial, counsel for the United States made the argumentative suggestion that the Master take such notice, but the Master did not, as his refusal to amend his findings and conclusions establishes. (Transcript of Record, Vol. 5, pp. 10-20). No evidence was presented respecting any other need for the claimed instream flows, and there is no question that the burden of going forward and the burden of proof in this regard were clearly on the United States.* (Kinney, Irrigation and Water Rights, §1554,

*Apparently recognizing its weak position with respect to minimum instream flows for "fish purposes," the United States attempted to articulate its claims on the basis of other alleged forest purposes subsequent to trial. In response New Mexico stated that:

... (The United States is) (n)ow, however, asking the court to ignore the record and the evidence at trial, to substitute new 'purposes' for the claimed instream uses, and to change its decision sustaining New Mexico's objections. I would suggest, however, that the proper forum in which to argue the merits of your honor's decision is the New Mexico Supreme Court on appeal.

It appears that the United States is simply quarreling with the court's decision. The United States is also suggesting that the court disregard certain uncontested evidentiary findings and replace them with "judicial notice" of other alleged facts which would operate to change the result of the trial. As to the former approach the proper forum is the New Mexico Supreme Court, and as to the latter it is not only "a bit unusual," as the United States suggests, but a bit irregular. (Tr. of Record, Vol. V, pp. 36-38).

p. 2802). It is also clear that neither the Court nor its Special Master could have taken judicial notice of ultimate facts. The question was not whether "wildlife habitat protection (and) aesthetics" would be enhanced by an abundance of water, but rather whether these objects were "valid forest purposes" within the meaning of the Organic Administration Act of June 4, 1897.

In petitioning this Court to issue a writ of certiorari to the New Mexico Supreme Court the United States is bound by its case as it is. With respect to its claims for future water rights, which have not yet been asserted in this case, the United States is not barred from asserting that instream flows might be necessary for erosion control or fire protection on the basis of the recognized purposes of prudent watershed management and the maintenance of timber. Indeed, on November 28th and 29th, 1977, the United States made just such assertions with regard to the Lincoln National Forest in another adjudication pending in state court in New Mexico. (*State ex rel. S. E. Reynolds v. L. T. Lewis, et al.*, Chaves County Cause Nos. 20294 and 22600; cf., Reason No. 3 for denying the writ, New Mexico's brief in opposition, pp. 17-18). With respect to the minimum instream flow claims already adjudicated, the only question that would properly be before this court if the writ were issued would be whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain. Colored by even the most romantic reading of the relevant legislative history, the answer to that question is undeniably no.

Respectfully submitted,

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Supreme Court, U. S.

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**REPLY MEMORANDUM FOR
THE UNITED STATES**

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THE UNITED STATES**

Respondent's Brief in Opposition, though relying principally on the opinion of the Supreme Court of New Mexico, advances three additional points that deserve brief comment.

1. Respondent contends (Br. in Opp. 17-18) that the petition for a writ of certiorari is premature because "[a]ll of the government's claims for water rights relating to watershed management and timber maintenance have not been adjudicated" (*id.* at 18). The decision of the New Mexico Supreme Court, however, has finally and conclusively determined the United States' claims to reserved water rights in the Gila National Forest for the purposes of recreation, minimum instream flows, and

stockwatering under federal permit programs. That determination, if not reversed, will bind the state district court on remand. Unless that decision is reviewed now, the parties will be required to complete the appropriation litigation without recognition of reserved water rights for these purposes; and then, if the present decision were later reversed, they would have to enter into a new round of proceedings in which these rights were taken into account. Meanwhile, denial of water to the United States for these important purposes could force discontinuance of federal programs and endanger fish resources in the forest. As "[n]othing that could happen in the course of the [proceedings on remand], short of settlement of the case, would foreclose or make unnecessary decision on the federal question" (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480), and as the consequences of delaying review would be needlessly severe, prompt consideration by this Court is appropriate. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120; *Mills v. Alabama*, 384 U.S. 214.

2. Respondent asserts (Br. in Opp. 3-5) that the United States has misrepresented the record because, respondent suggests, the special master and the court below did not have before them the question whether the United States is entitled to maintenance of minimum instream flows for protection from fire and erosion.¹ This contention is incorrect. As the United States pointed out before the

¹Respondent also contends (Br. in Opp. 4) that the recreational purposes for which water is sought by the United States encompass more than hiking, camping, fishing, and hunting. However, the United States is not asking this Court to decide whether it is entitled to reserved water for *every* desired recreational purpose, but whether it is entitled to water for *any* recreational purpose. The extent of the reserved water rights for recreation is an appropriate subject for further proceedings after remand.

district court (Tr. of Record 374-375), the special master took judicial notice that live streams not only support fish life but serve other valid forest purposes, including erosion control, fire protection, watershed protection, and wildlife habitat protection.² The United States expressly urged that these purposes be incorporated in the findings of fact and conclusions of law (*id.* at 375-376). Instead, the district court concluded that "the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (Conclusion of Law 11; Pet. App. 21a). Likewise, the Supreme Court of New Mexico, after noting the United States' argument "that minimum instream flows are necessary for aesthetic, environmental, recreational and 'fish' purposes" (Pet. App. 6a-7a), stated: "We cannot agree * * * that these objectives come within the original intent of Congress when creating national forests" (*id.* at 7a). Thus, although the United States does claim a right to minimum instream flows for the purpose of preserving endangered fish life, its claim has not been limited to that purpose and has not been treated as so limited by the courts below.

3. Although the district court concluded that "where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States" (Conclusion of Law 9; Pet. App. 20a), respondent appears to suggest (Br. in Opp. 6, n. 4) that this determination applies only to "significant water uses as might be made with respect

²Thus, there is no merit to respondent's contention (Br. in Opp. 3) that the special master recognized the United States' right to minimum instream flows for "fish" purposes only.

to a ski resort or mining operation." The United States would welcome any limitation on a holding that it believes to be legally incorrect, but we note that the district court's conclusion on its face carries no such qualification. We therefore submit that, despite respondent's apparent concession, further review of this issue remains appropriate.

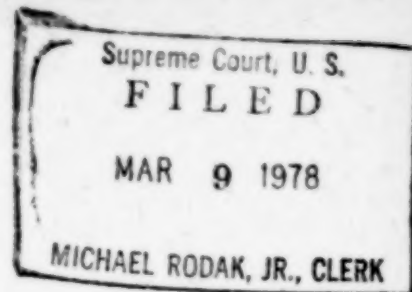
CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.



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THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the New Mexico Supreme Court (A. 234-241) is reported at 564 P. 2d 615. The order entered on June 4, 1976, in the District Court of the Sixth Judicial District in and for Luna County, New Mexico (A. 224-231), and the findings of fact and conclusions of law of its special master filed on May 5, 1975 (A. 190-199), are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on May 23, 1977 (A. 242). On August 11,

(1)

1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to October 3, 1977. The petition was filed on that date and granted on January 9, 1978 (A. 245). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the United States is entitled under its reserved water rights to the use of water in the Gila National Forest for the maintenance of minimum in-stream flows, for recreation, and for stockwatering, on the ground that these were among the purposes for which the national forests were created.

STATUTES INVOLVED

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (since repealed); the relevant portions of the Organic Administration Act of June 4, 1897, 30 Stat. 11, 34-36, as amended, 16 U.S.C. 473-482, 551; and the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, are set forth in the Appendix, *infra*, pp. 1A to 4A.

STATEMENT

The Rio Mimbres originates within the boundaries of the Gila National Forest in the mountains of southwestern New Mexico. It leaves the forest near the community of Mimbres and flows generally southward for about 50 miles. Near Deming, New Mexico, the river veers eastward for several miles and then disappears in a wide desert flat not far from the Mexican

border. This case concerns the rights to the waters of that river.

This action was instituted in 1966 in the District Court of the Sixth Judicial District of New Mexico as a suit among private parties to enjoin diversions of water from the Rio Mimbres. Various other private parties intervened in the suit until, in 1970, the State of New Mexico filed a complaint-in-intervention seeking a general adjudication of all water rights throughout the Mimbres stream system (A. 16-19). The State's complaint joined more than 900 parties as defendants, including the United States.¹

In its answer to the State's complaint, the United States invoked the federal law of reserved water rights and claimed entitlement to the use of the waters of the Rio Mimbres inside the national forest to the extent necessary "for the requirements and purposes" of the forest. The right to this water was reserved, the United States claimed, as of the dates that various tracts of public lands were withdrawn from the public domain for inclusion in the national forest (A. 27-29).

A. THE SPECIAL MASTER'S REPORT

In December 1970, the court appointed a special master to adjudicate the parties' claims. After receiv-

¹ The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. 666. Originally enacted as Section 208 of the Department of Justice Appropriation Act of 1953, 66 Stat. 560, the McCarran Amendment gives consent to state court suits against the United States for the adjudication of water rights to a river system. See *Colorado River Conservation District v. United States*, 424 U.S. 800, 802-803, 807-809.

ing evidence and hearing argument, the special master on May 5, 1975, issued findings of fact and conclusions of law with respect to the water rights of the United States inside the national forest. The special master concluded that the United States enjoyed reserved rights to the waters of the Mimbres River System "for uses necessary for the requirements and purposes" of the national forest (A. 197). Those rights vested, he concluded, as of the dates that the various portions of the forest were withdrawn from the public domain (A. 197).

Specifically, the special master found that water of the Rio Mimbres was used within the forest for recreation, for stockwatering, and for fish and wildlife purposes, and that the priority dates for the water used for these purposes ranged from 1899 to 1910 (A. 192-193). With respect to the recreational uses, the special master concluded that "among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting"² (A. 198). He further concluded that the United States had reserved rights in the water for the maintenance of minimum instream flows on the Mimbres in the amount of two cubic feet per second at three places on the stream

² The special master also found, however, that "until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 [citation omitted], no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses" (A. 198).

system (A. 198). The United States had contended that maintenance of some minimal level of instream flow within the forest was necessary for fish preservation, erosion control, fire prevention, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, and aesthetics (A. 88-89, 187, 205-207). Finally, the special master approved the use of reserved Mimbres water for stockwatering purposes by persons holding special use permits from the Forest Service, unless the permits specifically required that any water use be undertaken in compliance with state law (A. 198).

B. THE DISTRICT COURT'S DECISION

The State objected to the special master's report in several respects and submitted its objections to the district court. The State contended that the United States was not entitled to reserved water rights for the maintenance of minimum instream flows, for recreational uses of any kind, or for any stockwatering uses. On June 4, 1976, the state district court entered an order upholding the State's objections and modifying the special master's report accordingly (A. 224-231).

The district court concluded that the United States enjoyed no reserved water rights for any of the three disputed purposes, holding that these were not within "the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 230-231). With regard to stockwatering, the district court further held that since the United States

enjoyed no reserved rights for that purpose, the Forest Service permittees who were allowed to graze livestock inside the forest would have to establish their own rights to the use of Mimbres water under state law (A. 230).

C. THE DECISION OF THE NEW MEXICO SUPREME COURT

The New Mexico Supreme Court affirmed the district court's decision, holding that the United States enjoyed no reserved rights to the waters of the Mimbres for the purposes of recreation, stockwatering, or the maintenance of minimum instream flows (A. 234-241). The court acknowledged that the issue was governed by the federal law of reserved water rights and by this Court's holding in *Arizona v. California*, 373 U.S. 546, 601, that the United States "intended to reserve water sufficient for future requirements of * * * the Gila National Forest" (A. 235-236). But the court held that the purposes for which the United States was claiming reserved water rights were not among the purposes for which the Gila National Forest was created.

In defining the purposes for which the Forest was created, the New Mexico Supreme Court looked to a portion of the Organic Administration Act of 1897, 30 Stat. 34, as amended, 16 U.S.C. 475 (Organic Act), which contained the first statutory statement of standards for the creation, management, and use of the national forest system. Initially, the court noted that the Organic Act provided that national forests could be created for three express purposes: "1) improving

and protecting the forest; 2) securing favorable conditions of water flows; and 3) furnishing a continuous supply of timber" (A. 238). Later in its opinion, however, the court declared that the Act authorized the establishment of the Gila National Forest for only two purposes: "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (A. 241).

Construing the two remaining purposes, the court held that they did not encompass any of the purposes claimed by the United States. The court distinguished between the "purposes" for which the national forests were created and the "uses" to which Congress contemplated that they would be put, and reasoned that if any of the three "secondary uses" proposed by the United States conflicted with the "primary purposes" identified by the court, the "secondary uses" would not be permitted to continue (A. 238-239). The court thus concluded that the "uses" for which the United States claimed reserved water rights were not within the "purposes" for which a national forest could be established (A. 239).

The court found support for its position in the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, which declares it the policy of Congress that the national forests are established and shall be administered "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (A. 239). Noting that this statement of purposes was made only in 1960, and that the purposes were declared to be "supplemental to, but not in derogation of," the

purposes for which the national forests initially were established, the court concluded that the 1960 Congress did not envision these purposes as having been encompassed by the Organic Act of 1897 (A. 240).

Accordingly, the New Mexico Supreme Court held that "[r]ecreational purposes and minimum instream flows were not contemplated" as among the purposes for which the Gila National Forest was created, and that the United States therefore enjoyed no reserved water rights for these purposes (A. 241). The court reached the same conclusion with respect to stock-watering and therefore held that Forest Service permittees must obtain their water rights under state law (A. 241).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Gila National Forest was established by Presidential proclamation in 1899 and enlarged by subsequent proclamations in 1905, 1907, 1908, and 1910.^{2a} Portions of other national forests were subsequently transferred to the Gila, so that at present the Gila National Forest encompasses roughly three million acres of mountainous timberland in southwestern New Mexico.

The Gila is one of the 154 national forests, most of which are located in the Western States. In 1891, Congress authorized the President to create national forests by withdrawing lands from the public domain,³

^{2a} 34 Stat. 3123, 3126, 3274; 35 Stat. 2190; 36 Stat. 2694.

³ Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (Creative Act), repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792.

and in 1897, Congress gave the President the authority to modify or reduce the amount of public land reserved as national forests.⁴ By virtue of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2792, however, the President is now forbidden from withdrawing any part of the public domain to enlarge the inventory of the National Forest System, and by virtue of the Forest and Rangeland Renewable Resources Planning Act of 1974,⁵ he is also forbidden from returning any national forest lands to the public domain. In consequence, the enlargement or reduction of public acreage in the National Forest System can now be accomplished only by an Act of Congress. The National Forest System presently comprises 153,909,368 acres previously withdrawn from the public domain.

Since the time of the establishment of the Gila National Forest, the stream system of the Rio Mimbres has provided water to a substantial portion of the forest for a variety of purposes. Mimbres water has been used for recreational purposes such as hunting, fishing, and camping; it has been used to provide water for the livestock permitted to graze in the forest; and it has been used for small-scale conservation projects such as fish ponds and hatcheries (A. 60, 89-90, 99, 114).

⁴ Organic Administration Act of June 4, 1897, 30 Stat. 11, 36, 16 U.S.C. 473.

⁵ Section 10(a) of the Forest and Rangeland Renewable Resource Planning Act of 1974, 88 Stat. 476, 480, 16 U.S.C. (Supp. V), 1609(a), as amended by the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2957.

The ruling of the New Mexico Supreme Court in this case has put these uses in jeopardy. While recognizing the diverse purposes served by the forest, the New Mexico Supreme Court held that recreation, stockwatering, and maintenance of minimum instream flows were not among the purposes for which the national forests were created. The court therefore ruled that the United States has no reserved rights in the waters of the Mimbres for any of these purposes. Unless the court's decision is overturned, the Gila National Forest will be assured water for these purposes only to the extent that the individual users can assert and perfect their interests under the state law of prior appropriation or to the extent that the United States acquires rights in the water through exercise of its power of eminent domain.

I

The general legal principles applicable to this case are not in dispute; as the state supreme court recognized, the case is governed by the federal law of reserved water rights. Under that doctrine, when the United States withdraws land from the public domain for a federal purpose, it is deemed to have reserved at that time a sufficient quantity of the appurtenant unappropriated water to fulfill the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138-139. The doctrine applies to federal enclaves of all kinds, including Indian reservations, national parks, and national forests. *Arizona v. California*, 373 U.S. 546, 601. The question here, thus, is whether

the purposes for which the federal government created the Gila National Forest included the purposes of recreation, grazing, and maintenance of minimum flows in the forest streams, so that a reserved right of the United States to water for those purposes will be recognized.

II

In *Arizona v. California, supra*, the Master expressly found that recreation, grazing, and protection of the watershed were among the purposes of the Gila National Forest for which the United States was entitled to reserved water. Although the Court did not restate these specific findings, it approved the Master's conclusion that the United States had reserved rights to water in quantities necessary to fulfill the purposes of the Gila National Forest, and it entered a decree, tracking the terms of the Master's proposed decree, that adjudicated to the United States reserved water rights for the purposes of the Gila National Forest. The decree in *Arizona v. California* constitutes a prior adjudication holding that recreation, grazing, and watershed protection are among the purposes for which the United States is entitled to reserved water rights in the Gila National Forest. Since New Mexico and the United States were parties to that case, under the principles of collateral estoppel New Mexico is bound by that adjudication here.

III

The holding of the New Mexico Supreme Court that the United States has no reserved right to maintain

minimum flows in the streams of the Rio Mimbres within the National Forest is at war with the express terms and the legislative background of the governing statutes, including the Creative Act of 1891 and the ~~Organic~~ ^{Organic} Act of 1897.

The Organic Act provides that a national forest can be established for any of three purposes: (1) to improve and protect the forest; (2) to secure favorable conditions of water flows; or (3) to furnish a continuous supply of timber. The United States argued below that it needed to be assured of minimum instream flows on the Mimbres for a variety of purposes, including fire and erosion prevention, fish and wildlife conservation, watershed protection, and maintenance of natural flow downstream. These purposes fit squarely within both of the first two purposes set out in the Organic Act. A stream flow of at least some minimum volume protects the forest by preventing fire and erosion, by providing water for the wildlife and fish, and by preserving the watershed. Maintenance of instream flows is also within the meaning of "securing favorable conditions of water flows." In addition, the provisions of the Organic Act directing the Secretary of the Interior (subsequently the Secretary of Agriculture) to preserve the national forests from destruction, and authorizing him to regulate their occupancy and use, further indicate a congressional intention to safeguard the forests from the kinds of injury that can result from deprivation of their natural streamflows.

The background and legislative history of the Organic Act confirm that maintenance of minimum in-

stream flows was within the purposes for which the creation of national forests was authorized. By enactment of the Organic Act and its predecessor statutes in the 1890's, Congress sought to stem the destruction and uncontrolled exploitation of publicly owned forests; at the same time, Congress appreciated the beneficial effects of mountain forests in regulating the flow of water in streams and rivers. The legislative materials, as well as the statutory language, compel the inference that Congress intended to reserve sufficient water to maintain minimum levels of flow in the streams within the national forests.

IV

While recreation and stockwatering were not among the primary purposes for which the Organic Act authorized the creation of national forests, the legislative and administrative record prior to and immediately following passage of the Act establishes that they were among the secondary objects that Congress intended the national forests to serve. The New Mexico Supreme Court, construing the Organic Act narrowly, concluded that any purpose not expressly stated in that Act was not a legitimate purpose of a national forest. But the legislative and administrative background demonstrates that the Organic Act was not meant to restrict national forests to the specific purposes listed in the Act, but only to provide that a national forest could not be created unless one of the statutory purposes was present. Moreover, one reason for the statutory purpose of "protect[ing] the

forest" was to preserve it for recreational enjoyment. Administrative and legislative actions make it clear that recreation and stockwatering were regarded as legitimate, if secondary, purposes of the national forests from the time of the Organic Act and earlier. In 1899, the year that the Gila National Forest was first established, Congress passed laws designed to facilitate tourism in the national forests and to protect their fish and game.

This interpretation of the Organic Act was confirmed when Congress passed the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531. That Act explicitly reaffirmed the various purposes served by the national forests, including watershed protection, recreation, and grazing, but adhered to the Organic Act in providing that while a national forest could be created in part to serve any of these purposes, it could not be created unless one of the three primary purposes set forth in the Organic Act was present.

Finally, the decision of the New Mexico Supreme Court would interfere with a longstanding federal program of range management in the national forests, which is administered through a system of grazing permits issued by the Forest Service. In carrying out its statutory mandate to regulate the occupancy and use of the national forests, the Forest Service employs a grazing permit program that depends in part on its ability to control and allot stockwatering rights to its permittees. The state court's ruling denying the United States any right to reserved water for stock-

watering purposes in the national forest, and requiring Forest Service permit holders to obtain their water rights individually under state law, would impair the effectiveness of the federal grazing permit system, thus placing an unreasonable burden on federal range management and interfering with federal control of federal lands.

ARGUMENT

I. THE UNITED STATES ENJOYS RESERVED WATER RIGHTS IN THE MIMBRES RIVER TO THE EXTENT NECESSARY TO FULFILL THE PURPOSES OF THE GILA NATIONAL FOREST.

It is well settled that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138; accord, *Arizona v. California*, 373 U.S. 546, 597-602; *United States v. Powers*, 305 U.S. 527, 528; *Winters v. United States*, 207 U.S. 564, 575-578. Because the federal right applies only to waters that are unappropriated at the time the public land is reserved, it is subordinate to rights perfected before the establishment of the federal enclave. But it is superior, in turn, to rights perfected after that date. "[T]he United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert v. United States*, *supra*, 426

U.S. at 138; *Arizona v. California, supra*, 373 U.S. at 600; see also Morreale, "Federal-State Rights and Relations", in 2 Clark, *Waters and Water Rights* 58-71 (1967).

The doctrine of reserved water rights was first clearly stated in *Winters v. United States*, 207 U.S. 564. The question there was whether the creation of the Fort Belknap Indian Reservation carried with it the implied reservation of a sufficient amount of water from the Milk River for irrigation purposes. After concluding that the purpose of creating the Reservation was to convert the Gros Ventre and Assiniboin Indians from a nomadic into a pastoral people, the Court held that the creation of the Reservation established an implied right to sufficient water to fulfill that purpose by permitting the Indians to irrigate their land.

The doctrine is not limited to Indian reservations but applies to any federal enclave, including national parks and national forests. *United States v. District Court for Eagle County*, 401 U.S. 520, 522-523; see *Cappaert v. United States, supra*, 426 U.S. at 138. In *Arizona v. California, supra*, this Court held that the doctrine applies to the very national forest involved in this case. The Court stated (373 U.S. at 601):

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water suffi-

cient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Since the doctrine is based on the need for the water to satisfy the purposes of the federal enclave, the amount of water reserved is the amount "sufficient to accomplish the purposes of the reservation." *Cappaert v. United States, supra*, 426 U.S. at 139. That much is reserved, and "no more." *Id.* at 141. Determination of the amount involves consideration, however, of "the future as well as the present needs" of the reservation. *Arizona v. California, supra*, 373 U.S. at 600. In sum, as this Court stated in *United States v. District Court for Eagle County, supra*, 401 U.S. at 523, "[t]he reservation of waters may be only implied and the amount will reflect the nature of the federal enclave."

In this case, then, the United States enjoys reserved rights in the waters of the Rio Mimbres within the Gila National Forest to the extent that the water is necessary to fulfill the purposes of the Forest. The question is what those purposes are.

II. THIS COURT HAS PREVIOUSLY HELD THAT THE UNITED STATES HAS RESERVED RIGHTS TO THE USE OF WATER IN THE GILA NATIONAL FOREST FOR EACH OF THE PURPOSES ASSERTED HERE

In contrast to the New Mexico Supreme Court's narrow view of the purposes of the national forests,

this Court has previously recognized that the United States has reserved rights to water in national forests, and in the Gila National Forest in particular, for a variety of purposes that include all those at issue in this case.

In *Arizona v. California*, 373 U.S. 546, decree entered, 376 U.S. 340, the Court decreed that the United States had the right to divert water from the Gila and San Francisco Rivers in the Gila National Forest "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used" (376 U.S. at 350). The New Mexico Supreme Court treated this portion of the Court's decree as leaving open the questions "for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water" (A. 237). But examination of this Court's opinion, its decree, and the Master's Report demonstrates that both questions were decided in *Arizona v. California*.

The first question—"for what purpose the Gila National Forest was originally established"—was squarely decided by the Master. He found that the 11 National Forests in the Lower Colorado River Basin, which include the Gila National Forest, were established for the following purposes:

- (1) the protection of watershed and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) produc-

tion of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.

Special Master's Report in *Arizona v. California*, p. 96 (December 5, 1960).

The second question—"whether those purposes necessarily require an implied reservation of water"—was answered by the Master's finding that:

In withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the Forest.

[Master's Report *supra*, at 342.]

This finding, and its accompanying conclusion of law (*id.* at 343),⁶ were approved in this Court's opinion⁷ and incorporated in the portion of its decree quoted above (376 U.S. at 350).

New Mexico contends (see Brief in Opposition to Petition for Certiorari, at 15) that the question of the purposes of the Gila National Forest remains open

⁶ The conclusion of law, which in turn was made a part of the Master's recommended decree and subsequently adopted by this Court, read as follows:

"The United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used." Master's Report, *supra*, at 343. See also *id.* at 358 (recommended decree); 376 U.S. 340, 350 (final decree).

⁷ "We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of * * * the Gila National Forest." 373 U.S. at 601.

because it was not decided "specifically" by the Court in *Arizona v. California*, but only by the Master. While this Court did not reiterate the Master's finding with regard to the purposes of the Forest, that finding was an essential predicate of the Court's decree. If the purposes of the national forests at issue in *Arizona v. California* were not determined in that case, this Court's decree did no more than restate the bare legal proposition that the United States is entitled to reserved water rights to the extent of the purposes of the federal enclave, whatever those purposes may be. On that view of the decision in *Arizona v. California*, this Court left the claim of the United States to reserved rights in the Gila and San Francisco Rivers for the Gila National Forest open to complete relitigation, in a state or federal court, on the assertion that the purposes of the Forest were not as broad as the Master found and do not, after all, confer any reserved rights.

We submit that the Court in *Arizona v. California* did more than that. It meant to, and did, adjudicate the rights of the United States to take water from the Gila and San Francisco Rivers for the purposes of the Gila National Forest. In doing this, it necessarily based its decree on the Master's finding of what the purposes of the Gila National Forest were.⁹ For it was that finding that gave content to the Master's conclu-

⁹ Master's Report, *supra*, at 96 (quoted at pp. 18-19, *supra*). The Master made a further finding that "the future water requirements of the Gila National Forest appear to be so modest that it is unnecessary to put maximum limits on the reserved water rights created for its benefit." *Id.* at 335.

sion—specifically adopted by the Court—that the United States was entitled to divert water "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest" (376 U.S. at 350; Master's Report, *supra*, at 343, 357-358).

Accordingly, under the principles of collateral estoppel, since the issue was litigated and determined by a valid final judgment and since the determination was essential to the judgment, New Mexico is bound by the determination in *Arizona v. California* of the purposes for which the Gila National Forest was established.⁹ See American Law Institute, *Restatement of Judgments* § 68 (1942).¹⁰ But even if this were not the case, that determination is persuasive

⁹ New Mexico was a party to *Arizona v. California*, as was the United States. See 373 U.S. at 551 and n. 3; 350 U.S. 114.

¹⁰ New Mexico argues (Brief in Opposition to Petition for Certiorari, at 14) that it should not be bound by the determination because the Master's finding was not supported by the evidence. This claim comes too late; a determination made against a party in a prior action cannot be challenged on the ground that it was incorrect. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329; *Cromwell v. County of Sac*, 94 U.S. 351.

New Mexico also relies (Brief in Opposition to Petition for Certiorari, at 14) on the Court's statement, at the end of its opinion in *Arizona v. California*, *supra*, 373 U.S. at 602, that it had disagreed with the Master on some points and not ruled on others and that it would therefore entertain submissions from the parties regarding the form of the final decree. However, the Court expressly stated in its opinion that it agreed with the Master on the question of reserved rights for the Gila National Forest, 373 U.S. at 601, and it adopted that portion of the Master's recommended decree *verbatim*. Compare Master's Report, *supra*, at 357-358, with *Arizona v. California*, *supra*, 376 U.S. at 350.

and, for the reasons discussed in the remainder of this brief, it is correct.

III. MAINTENANCE OF MINIMUM INSTREAM FLOWS FOR FIRE PREVENTION, EROSION CONTROL, AND CONSERVATION OF FISH, GAME, AND PLANTLIFE IS AMONG THE PURPOSES FOR WHICH THE NATIONAL FORESTS WERE CREATED

In the proceedings below, the United States claimed a reserved right in the waters of the Mimbres sufficient to maintain minimum instream flows for a variety of purposes. Before the special master, the United States presented evidence that maintenance of minimum instream flows was necessary for fish preservation, and particularly for preservation of the Gila trout, a rare and endangered species native only to the Gila National Forest (A. 88-90). The United States argued that maintenance of minimum instream flows served other valid forest purposes as well, such as erosion control, fire prevention, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, and aesthetics (A. 187); and the special master stated that he could take judicial notice of these purposes (A. 205-206).¹¹ The master awarded the United States the right to maintain a minimum nonconsumptive instream flow of two cubic feet per second at three

¹¹ The special master made this statement at an untranscribed hearing on March 6, 1975 (see A. 171-173). Reference to his statement appears in a pleading filed by the United States in the state district court (A. 205-206). The accuracy of that reference was not disputed by the State.

points on the Mimbres stream system within the national forest, listing the purpose as "fish" (A. 192-193, 198).

Before the special master's report was issued, the United States requested that the proposed findings be reworded to make it clear that the minimum instream flows would serve not only "fish" purposes but also the purposes of watershed protection and the maintenance of natural downstream flows, and to indicate that they "would also produce other equally valid results such as improved fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc." (A. 187). After the master declined to reword the findings, the same request was made to the state district court (A. 200-207). Alternatively, the United States requested leave from the court to submit additional evidence on the need for minimum instream flows (A. 219). The district court, however, overturned the special master's decision altogether, ruling that the United States had no reserved rights to minimum instream flows for any purpose "for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 231).

In the New Mexico Supreme Court, the United States again pressed its view that the maintenance of minimum instream flows was necessary not only for "fish" purposes but also for the purposes of "erosion control, fire protection, watershed protection, wildlife habitat protection and aesthetics" (Brief for the United States on appeal to the New Mexico Supreme Court, at 14). The supreme court adverted to the

argument that minimum instream flows were necessary for a variety of purposes, including the "fish" purposes explicitly recognized in the special master's report, but it held that these objectives, however laudable, did not "come within the original intent of Congress when creating national forests" (A. 238). "[M]inimum instream flows were not contemplated," the court held (A. 241). Accordingly, the court affirmed the decision of the state district court holding that the United States had no reserved rights to water for maintenance of minimum instream flows for any purpose.

We submit that this ruling is erroneous in light of both the express purposes for which the creation of national forests was authorized and the legislative history of the statutes creating and providing for the management of the national forest system.

A. MAINTENANCE OF MINIMUM INSTREAM FLOWS FOR PROTECTION AGAINST FIRE AND EROSION AND FOR CONSERVATION OF FISH, GAME, AND PLANTLIFE FALLS WITHIN THE PURPOSE OF IMPROVING AND PROTECTING THE FOREST

1. *The Organic Act of 1897 expressly provides that national forests can be established for the purpose of improving and protecting the forest*

Although Congress provided for the creation of a national forest system in the "Creative Act" of March 3, 1891 (26 Stat. 1095, 1103), it supplied no guidance at that time concerning the purposes or uses of the forest reservations or the ways they should be managed. The first congressional answer to these questions

was provided in the "Organic Administration Act" of June 4, 1897 (30 Stat. 11, 34-35). The decision of the New Mexico Supreme Court in this case turned on the court's construction of that Act.

The Organic Act provides, in pertinent part (30 Stat. 35):¹²

No national forest shall be established except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the [Creative Act of 1891] and which may be continued; and he may make such rules and regulations and establish such service as

¹² The quoted paragraphs from the Organic Act are codified, as amended, in 16 U.S.C. 475 and 551. Section 551 was amended in 1905, when Congress transferred control of the forest reserves from the Secretary of the Interior to the Secretary of Agriculture. 33 Stat. 628, 16 U.S.C. 472. In 1907, Congress redesignated the "forest reservations" as "national forests." 34 Stat. 1269. And in 1976, Section 551 was repealed insofar as it applied "to the issuance of rights of way over, upon, under, and through * * * lands of the National Forest System." Pub. L. 94-579, 90 Stat. 2793.

will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forest thereon from destruction * * *.

The state court's interpretation of this statute was flawed in several respects. The court disregarded the first of the three express purposes for which the statute provided that national forests could be created, "to improve and protect the forest." The court wrongly held, without discussion, that maintenance of minimum instream flows was outside the scope of the second express statutory purpose, "securing favorable conditions of water flows." The court incorrectly dismissed the second paragraph of the Act as only reflecting permissible "uses" of the national forests and not relating to the "purposes" set out in the preceding paragraph. And the court wrongly interpreted the Act as precluding supplemental purposes rather than simply requiring that one of the stated purposes be present to justify the creation of a national forest.

The New Mexico Supreme Court initially recognized that the Organic Act states three purposes for which a national forest may be created (A. 238):

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The court did not suggest—nor has the State—that the purposes for which the Gila National Forest was

created were in any way narrower than the purposes for which the Organic Act stated that national forests generally could be established.¹³ Yet later in its opinion, without any explanation, the court reduced the three statutory purposes to two (A. 241):

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber.

The purpose of "improving and protecting the forest" had been discarded.

Dismissal of the first statutory purpose was error. The language of the Act leaves no doubt that "to improve and protect the forest" is an independent purpose, and this Court has recognized it as such. In *United States v. Grimaud*, 220 U.S. 506, 515, in the course of discussing the Organic Act, the Court stated that the "forest reservations * * * were intended 'to improve and protect the forest and to secure favorable conditions of water flows.'"

¹³ No such suggestion would be tenable, since the Presidential proclamations creating and expanding the Gila National Forest provide no support for any such limitation. In the first of those proclamations (34 Stat. 3126), President McKinley created the Gila National Forest, under the name Gila River Forest Reservation, stating only that the lands included in the Forest were "in part covered with timber" and that it appeared "that the public good would be promoted by setting apart and reserving said lands as a public reservation." Subsequent proclamations expanding the Forest (34 Stat. 3123, 3274) used identical language, which was the standard formula for a proclamation creating a national forest at that time.

Further textual support for the purpose of protecting the forest is provided by the second paragraph of the Organic Act quoted above (pp. 25-26, *supra*). That paragraph (codified as 16 U.S.C. 551) requires the Secretary of the Interior to provide against "destruction by fire and depredations upon the public forests" and authorizes him to make rules and establish services to "insure the objects of such reservations, namely, * * * to preserve the forests thereon from destruction * * *." It thus confirms that conservation was among the basic purposes for which the national forests were established, and it underscores the importance of the Organic Act's first stated purpose: "to improve and protect the forest."

The New Mexico Supreme Court gave only passing attention to the second paragraph, regarding it not as an expression of the "purposes" of the national forests but only as an instrument for regulating their "uses" (A. 238-239). But the provision reflects directly on the purposes set out in the immediately preceding paragraph. It specifically refers to "the objects of such reservations," which are stated to include preservation of the forests from destruction, and by directing the Secretary to provide against "destruction by fire and depredations upon the public forests" it seeks to implement the stated congressional purpose "to improve and protect the forest."

2. Maintenance of minimum flows in forest streams is necessary to protect the forest

Assuring the availability of minimum flows in the forest streams is well within the meaning of "improv-

[ing] and protect[ing] the forest." Such flows serve, among other things, to protect against fire and erosion and dessication of the watershed. Moreover, since the "forest" consists not only of timber but of the fish, game, and plantlife that are also part of the sylvan ecology, minimum stream flows serve to improve and protect the forest by contributing to the conservation of all these living things.

The need is not academic, nor the danger unreal. New Mexico, like most of the Western States, has adopted the doctrine of prior appropriation as the touchstone of its water rights law, instead of the common law doctrine of riparian rights that prevails in the more humid Eastern States. See 3 Hutchins, *Water Rights Laws in the Nineteen Western States* 390 (1977). A series of earlier federal statutes, including the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321, had deferred to state law to govern the private use of water found on public lands,¹⁴ and in the Organic Act of 1897 this concept was applied, in part, to lands withdrawn for the establishment of national forests. The pertinent provision states (30 Stat. 36, 16 U.S.C. 481):

All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the States wherein such national forests are

¹⁴ The same concept had been embodied in various statutes governing mining on public lands. See Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51; Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52.

situated, or under the laws of the United States and the rules and regulations thereunder.

Under this statutory authority, private appropriators have long been permitted to remove water from national forest lands for private purposes, including substantial uses such as those involved in mining and irrigation. If private appropriators remove a substantial volume of water from streams in the upper reaches of the national forest—especially a relatively small stream in a generally arid area, like the Mimbres—the instream flow in the forest below can be reduced to the point of injuring the land and life of the forest. This case is one of a number of pending water rights cases, involving at least 17 other national forests, in which the United States has asserted a reserved right to insist on the maintenance of minimum flows in forest streams for purposes such as fire and erosion prevention, wildlife habitat protection, and preservation of natural flow in the watershed.¹⁵ These purposes, we submit, serve the ultimate purpose of “improv[ing] and protect[ing] the forest” within the meaning of the Organic Act.

¹⁵ The cases of *United States v. Adair*, D. Ore., Civil No. 75-914, *United States v. Truckee-Carson Irrigation District*, D. Nev., Civil No. R-2897 JBA, *United States v. Tongue River Water Users Ass'n.*, D. Mont., Civil No. CV-75-20-Blg, and *State of New Mexico ex rel. Reynolds v. MolyCorp*, D. N.M., Civil No. 9780, are pending in federal district courts. The case of *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, No. 22418, is pending in the Supreme Court of Idaho. And general water rights adjudications are pending in state courts in Colorado, Wyoming, and Montana.

3. *Improving and protecting the forests was among the chief concerns of Congress in enacting the Organic Act of 1897*

The legislative history of the Organic Act supports the view that protection against fire and erosion and conservation of the land and life of the forest were contemplated as being within the statutory purpose “to improve and protect the forest.”

The national forest system was first established in the 1890's through a series of legislative enactments and Presidential proclamations. The impetus for the creation of national forest reserves had come from the conservation movement of the late nineteenth century, which had sparked public alarm over the depletion of forests in the Northeast and Great Lakes States. Throughout this period, concern over the diminishing forest reserves was combined with recognition of the importance of forest cover in preventing floods and with a growing interest in the forests' recreational and aesthetic values. See Fernow, *Report Upon the Forestry Investigations of the U.S. Department of Agriculture, 1877-1898*, H.R. Doc. No. 181, 55th Cong., 3d Sess. 168-191 (1899); Frome, *The Forest Service* 3-5 (1971); Gates, *History of Public Land Law Development* 563 (1968).

Responding to the appeals of conservationists such as Carl Schurz and a growing corps of professional foresters, Congress in the early 1890's acted to protect the forests situated on the nation's public lands. See Cameron, *The Development of Governmental Forest Control in the United States* 204-205 (1972 ed.). In 1890, Congress created the first national forest when it

set aside certain public lands in California as "reserved forest lands." Act of October 1, 1890, 26 Stat. 650, 651. Section 2 of that Act placed the lands under the control of the Secretary of the Interior, who was assigned the duty of promulgating rules and regulations for their care and management. These regulations, the Act stated, "shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition." 26 Stat. 651. The Act further instructed the Secretary to "provide against the wanton destruction" of the fish and game inside the reservation, "and against their capture or destruction, for the purposes of merchandise or profit," and to take "all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act." *Ibid.*

Less than a year later, Congress provided for the systematic extension of the concept of national forests that had begun with the 1890 legislation. In the Creative Act of 1891 (26 Stat. 1095, 1103), Congress gave the President general authority to establish national forests, or "forest reservations," by reserving public lands that were "wholly or in part covered with timber or undergrowth, whether of commercial value or not." The major force behind the enactment of the Creative Act was Bernard E. Fernow, the chief of the Forestry Division of the Department of Agriculture between 1885 and 1898. Gates, *supra*, at 565. At the time the Creative Act was passed, Fernow outlined

the purposes behind the creation of the forest reservations in his *Report of the Chief of the Division of Forestry for 1891*, p. 224 (1892):

These are first and foremost of economic importance, not only for the present but more specially for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purposes of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction. Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. * * *

All the purposes of the Creative Act, Fernow said, could be achieved by proper forest management through "[r]egulation of the occupancy and the use of the reservation" (*id.* at 226). While emphasizing that "the multiplication of national parks in remote and picturesque regions was not the intent of the law," Fernow noted that the reservations were specifically designed to prevent fire and useless destruction of public property, to provide revenue from the sale of forest products, and "altogether to administer this

valuable and much-endangered resource for present and future benefit" (*id.* at 224).

Although the Creative Act provided for the establishment of national forests, it supplied no guidance as to how the resources of those forests would be managed and used. Efforts continued in Congress to pass more specific legislation, and the Organic Act of 1897 was the result.

The Organic Act was proposed by Senator Pettigrew of South Dakota (30 Cong. Rec. 900 (1897)) as an amendment to a general appropriations bill, and it was intended to serve several functions. See Gates, *supra*, at 569-572; Pinchot, *Breaking New Ground* 113-118 (1972 ed.). First, the Pettigrew Amendment suspended the implementation of an unpopular series of forest-reserve proclamations issued by President Cleveland in the last days of his second administration. Second, the amendment authorized future Presidents to return forest reserve land to the public domain or otherwise modify prior Presidential proclamations withdrawing public lands for forest purposes. Finally, the Pettigrew Amendment addressed the questions left unanswered by the Creative Act by setting out more definite legislative standards for creating, utilizing, and managing the forests. The pertinent portions of the Pettigrew Amendment were enacted without modification and have been codified as 16 U.S.C. 475 and 551 (quoted at pp. 25-26, *supra*).

The congressional debates on the Pettigrew Amendment focused on the objective of opening the forest

resources to public use while providing an orderly scheme for protecting the forest cover from destruction. That the congressional purposes encompassed "improving and protecting the forest," including the conservation of forest waters, is clear from many of the comments during the floor debates on the amendment. Senator Warren, one of the sponsors of the Pettigrew Amendment, stated that the purposes of creating forest reserves included "conservation and retention of the waters" in the forests, and continued (30 Cong. Rec. 913 (1897)):

For what purpose do we lay out forest reserves unless it is for the preservation of forests; and if through such preservation we do not provide for the conservation and retention of the waters, etc., then do we not utterly fail in the very object we seek in laying out such reservations? I maintain that with the adoption of the amendment which is now offered very much is done toward providing for the protection of forests on the reservation when finally made, though not enough, it is true.

Senator Warren added that the major peril to forests was in their "neglect" (*ibid.*). The creation of national forests, he concluded, would provide a means of curing that problem (*id.* at 914):

These great fires are sometimes set * * * to drive the game out from the forests into the open where it can be more easily captured, and such fires are also started through carelessness about putting out camp fires, or from the pipe

or cigar of the smoker; but through whatever cause started, the ravages of fire can be greatly lessened by proper policing of the forest districts.

So I beg that no point of order may lie against [the Pettigrew Amendment], and that we may decide upon some provision, either the whole amendment or a portion of it, and pass it, to the end that we may have proper forest reservations, and having them we may also have some way of protecting them.

Senator Pettigrew himself emphasized the importance of protecting the forests, noting that under his amendment the Secretary of the Interior would have broad regulatory authority to fashion "a system of forestry administration" to protect the forests of the West and "keep them in a condition as good as they are now" (30 Cong. Rec. 913 (1897)).

The legislative background thus underscores the statutory language. The mandate "to improve and protect the forests" subtended the purposes of conservation and prevention of fire and erosion. Since minimum natural flows in forest streams are necessary to accomplish these purposes, it must be inferred that the government intended to reserve unappropriated water sufficient to maintain such flows when the forests were withdrawn from the public domain. *Cappaert v. United States*, *supra*, 426 U.S. at 139. Any other conclusion would disregard Congress' determination to protect and preserve "these great bounties of nature" (30 Cong. Rec. 915 (1897) (Sen. Gray)).

B. MAINTENANCE OF MINIMUM INSTREAM FLOWS ALSO FALLS WITHIN THE STATUTORY PURPOSE OF SECURING FAVORABLE CONDITIONS OF WATER FLOWS

In addition to satisfying the statutory purpose of protecting and improving the forest, maintenance of minimum instream flows is squarely within the second purpose stated in the Organic Act: "securing favorable conditions of water flows." The New Mexico Supreme Court gave no reason for its ruling to the contrary.

A distinctly unfavorable "condition of water flows" would be no water flow at all. Yet under the New Mexico Supreme Court's decision, the United States has no reserved right to ensure any flow of the streams in the national forests. If the state law of prior appropriation allows upstream appropriators to withdraw the full contents of the stream, the United States has no ground for protest against the dry bed running through the national forest. It can only resort to eminent domain and buy the stream back.

The statutory purpose of "securing favorable conditions of water flows" is defeated if the national forest has no reserved right to maintain any flow at all. And, as in the case of the "improve and protect" clause, the legislative history provides direct support for the natural reading of the statutory language.

From the legislative history of the Organic Act, it is clear that the Fifty-Fifth Congress understood the beneficial effects of forested uplands in mitigating otherwise destructive fluctuations in stream flow. It

was known that forests naturally evened stream flows by restraining floods in wet periods and releasing moisture gradually into the mountain streams during dry months. The destructive effects of the wide fluctuations in stream flow that resulted when mountain-sides were denuded of their forests were well understood. Writing of the purposes of the Creative Act of 1891, Fernow emphasized the "purpose of preserving or equalizing waterflow in the streams" and preventing "formation of torrents and soil washing" (see p. 33, *supra*). The Interior Department, charged with carrying out the mandate of the 1891 Act, issued a "circular of instructions relating to timber reservations" shortly after the Creative Act was passed, which noted that in selecting lands for forest reservations:

it is of the first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.

Department of the Interior, Circular to Special Agents of the General Land Office, dated May 15, 1891 (reproduced at 29 Cong. Rec. 2514 (1897)).

Similarly, during the debates on the Organic Act, Representative McRae stated (30 Cong. Rec. 966 (1897)):

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so they will not rush to the streams in torrents in the spring and early summer. We all know that in a well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

* * * * *

If we can learn nothing from Italy, France, and countries of the Old World, let us turn to New England and other parts of our own beloved country and see the destruction in the frequent freshets, bursting dams, and shallow rivers. Let us, if possible, save the South and West from the same fate.

Other Congressmen echoed this concern for protecting the forests so as to "preserve their streams" (30 Cong. Rec. 981 (~~1870~~) (Rep. Lacey)) and to "increas[e] the flow" of those streams (30 Cong. Rec. 985 (1897) (Rep. Bell)). See also 30 Cong. Rec. 982 (1897) (Rep. Shafroth); 30 Cong. Rec. 1011 (1897) (Rep. DeVries). In the Senate, likewise, there was general acceptance of the effect of forested lands in preserving water and in preventing extremes of flooding and dryness. See 30 Cong. Rec. 915 (1897) (Sen. Gray); 30 Cong. 916 (1897) (Sen. Clark); 30 Cong. Rec. 917 (1897) (Sen. White).

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Congress thus could not have intended that the national forests could be artificially deprived of a minimum natural flow in the forest streams. It did not intend to authorize appropriation of forest streams to the point of interference with "favorable conditions of water flows," any more than it intended to authorize interference with the federal government's ability "to improve and protect the forest." The United States therefore has a reserved right to insist on some minimum level of instream flow through its national forests, consonant with these purposes.

IV. RECREATION AND STOCKWATERING ARE AMONG THE SECONDARY PURPOSES FOR WHICH THE GILA NATIONAL FOREST WAS CREATED

The entitlement of the United States to a reserved water right for recreational purposes of the Gila National Forest was not contested before the special master because of a concession made by New Mexico. In a brief filed on November 30, 1972, the State conceded that recreation was a valid purpose for the creation of a national forest under the Organic Act of 1897. New Mexico stated (A. 40):

An extremely technical argument could be made in order to establish that recreation was not a valid purpose for the creation of a national forest until the passage of the Multiple Use Sustained Yield Act of June 12, 1960. (74 Stat. 215.) We find the argument ill-advised and concede the above stated point to the extent such recreation is of a magnitude revealed in traditional and historical use.

Pursuant to this concession, the State submitted a proposed conclusion of law regarding recreational uses, which the special master adopted *verbatim* (A. 146, 184):

That among the uses to which the waters of the Mimbres System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.

The special master further concluded (A. 198):

That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 * * *, no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other substantial works involving large consumptive uses.

In the state district court, New Mexico recanted its concession and objected to the conclusion in the master's report that the State itself had proposed. The State's contention before the district court was not only that large consumptive uses of water for recreational purposes were outside the valid original purposes of a national forest, but that the United States enjoyed no reserved water right in the Gila National Forest for any recreational use, even if the use was non-consumptive and incidental to such recreational activities as hiking or camping (A. 202-203, 221). The district court sustained the objection and adopted the State's new proposed conclusion of law, which read (A. 230):

That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreation.

On appeal, the New Mexico Supreme Court upheld this ban on any federal claim to reserved Mimbres water for recreational use. The court stated that recreational purposes were "not contemplated" among "the original purposes for which the Gila National Forest was created" (A. 241).

The claim of the United States to reserved water rights for stockwatering by Forest Service permittees was likewise given and then taken away by the State. At the hearing before the special master, testimony established that federal permittees had long been allowed to graze stock in the national forest and that they had traditionally used water from the Mimbres system to water the stock (A. 61-62, 114-115). The special master listed some 22 stockwatering uses of Mimbres water in the national forest, and characterized them as "national forest uses * * * made either by the United States or its permittees" (A. 192-193). The State again submitted a proposed conclusion of law (A. 146, 183-184), which the special master adopted *verbatim*. That conclusion read (A. 198):

That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest

Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States. [Emphasis added.]

In the district court, the State again objected to its own conclusion. It now wanted the conclusion modified to require that *all* Forest Service permittees obtain individually an adjudication of their rights to such water (A. 221-222). The district court adopted the State's proposed modification (A. 230). The new conclusion meant that the United States could not freely transfer stockwatering rights among its permittees; rather, on any transfer of grazing rights, the new permittee would be forced to establish his own right under state law to use Mimbres water for his stock.

The New Mexico Supreme Court again affirmed. The court ruled that the United States had no reserved water right in the forest for stockwatering, and hence that the water rights for this purpose must be perfected individually by each permittee in accordance with the state law of prior appropriation (A. 241).

A. RECREATION IS ONE OF THE PURPOSES FOR WHICH THE NATIONAL FORESTS, AND THE GILA NATIONAL FOREST IN PARTICULAR, WERE CREATED

1. *The legislative and administrative background*

The legislative and administrative record, both before and after passage of the Organic Act of 1897, demonstrates that Congress and the Forest Service

have always contemplated that the national forests would be used for recreational purposes such as hunting, fishing, hiking, and tourism.

The recreational purposes of the national forest were articulated throughout the period in which the national forests were first established. The 1890 Act creating the first forest reservations in California, specifically authorized the Secretary of the Interior to permit "the erection of buildings for the accommodation of visitors" and "the construction of roads and paths" through the forest. In addition, it instructed him to provide against the wanton destruction of the fish and game inside the forest, and against their taking "for purposes of merchandise or profit," and to protect all the "natural curiosities, or wonders within such reservation, * * * in their natural condition." 26 Stat. 651; see p. 32, *supra*.

The Creative Act, passed the next year, said nothing about the purposes of the forest reservations, but Chief Forester B. E. Fernow, in his contemporary construction of the Act, noted that recreation was among its "[s]econdary objects":

Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. * * * [Fernow, *Report of the Chief of the Division of Forestry for 1891* 224 (1892); see p. 33, *supra*.]

All the purposes of the Creative Act, Fernow noted, could be achieved by proper forest management through "[r]egulation of the occupancy and the use of the reservation" (*id.* at 226).¹⁶

The Organic Act, passed six years later, provided that no national forest was to be established except for the three stated purposes (30 Stat. 35, quoted at pp. 25-26, *supra*); that lands more valuable for minerals or agriculture "than for forest purposes" were not to be included (*ibid.*); and that the Secretary of the Interior was required to protect the reservations against "fire and depredations" and was authorized to make rules and regulations and establish service "to regulate their occupancy and use and to preserve the forests thereon from destruction" (*ibid.*). While it did disqualify lands more valuable for mining or agriculture, the Act did not narrow the purposes that national forests could be established to serve. Its insistence on the three stated purposes did not mean that a national forest could be established to serve only those purposes and no others; it meant that a national forest could not be established unless it served at least one of those purposes.¹⁷

¹⁶ The Department of the Interior circular setting out standards for administering the Act of 1891 also suggested that forest reservations could serve a variety of purposes. The circular noted that the Creative Act justified preservation of timber on public lands "for climatic, economic, or other public reasons." 29 Cong. Rec. 2515 (1897); see p. 38, *supra*.

¹⁷ Congress confirmed this policy and made it explicit in enacting the Multiple-Use Sustained-Yield Act of 1960. See pp. 53-56, *infra*.

Nothing in the Act or its legislative history indicated an intent to repudiate the supplemental purposes of the national forests, such as recreation, that were already recognized.¹⁸

To the contrary, the Act's first stated purpose, "to improve and protect the forest," was in accord with the "[s]econdary objects" noted in the Fernow Report: "to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure." Moreover, in authorizing the Secretary to make rules and regulations and establish service to "insure the objects of [the national forests], namely, to regulate their occupancy and use * * *" (30 Stat. 35), the Act plainly contemplated purposes additional to water flow and

¹⁸ Although recreational uses of the national forests were not specifically mentioned in the debates on the Organic Act, there were several comments that reflected Congress's awareness that the national forests would have aesthetic as well as economic value. Thus, Senator White expressed regret that a particular area was not included in a forest reserve:

"In the State of California and also in the State of Nevada there is a tract of land near Lake Tahoe, a very remarkable tract of land because of the wonderful scenery which it possesses. There are a number of lakes, some twelve or thirteen altogether, one of them being, I suppose, perhaps 8,500 feet above the sea, and the country surrounding them is of a romantic and lovely description.

"It is a character of country that ought to be reserved for the people for all time. * * * [Yet] although every other tract of land, desirable and undesirable, which was suggested for a reservation was reserved, this piece of land, over which a reservation should manifestly have been extended, was left open in order that it might be gobbled up."

30 Cong. Rec. 917 (1897). See also 30 Cong. Rec. 916 (1897) (Sen. Gray).

timber supply, the only two recognized by the New Mexico Supreme Court.

Indeed, the authority given the Secretary by the Act echoed the statement of Chief Forester Fernow in 1891 that all the forest purposes he identified could be achieved through "[r]egulation of the occupancy and the use of the reservation" (see p. 33, *supra*). Fernow's view of the national forests as "places of retreat for those in quest of health, recreation, and pleasure" (see p. 33, *supra*)—which was early and notably true of the Gila National Forest¹⁹—was also echoed and approved by a provision of the Organic Act (16 U.S.C. 478) authorizing entry by "any person" on the national forests "for all proper and lawful purposes," provided that the visitor complied with the "rules and regulations covering such national forests."

Roughly contemporaneous materials evince a continuing administrative and legislative interest in recreational use of the national forests. Less than two years after the passage of the Organic Act, Congress authorized the Secretary to grant leases of land near:

* * * mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. [Act of February 28, 1899, 30 Stat. 908.]

¹⁹ Visits to the Gila Cliff Dwellings (made a national monument in 1907, 35 Stat. 2162) and Gila Hot Springs, both located in the Gila National Forest, predated establishment of the forest and

The same year, on March 3, 1899, in the Forest Service Appropriations Act (30 Stat. 1095), Congress provided for the protection of the fish and game resources of the forest reserves by directing that the "forest agents * * * shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said Forest reservation is situated, in relation to the protection of fish and game."²⁰

The 1902 *Forest Reserve Manual* stated (p. 8):

All law-abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims, and for pleasure or recreation.

By 1905, the Forest Service's publication, *The Use of the National Forest Reserves*, reflected a variety of recreational purposes for the national forest system. Regulation 42 of that publication read:

Hotels, stores, mills, summer residences, and similar establishments will be allowed upon reserve lands wherever the demand is legitimate and consistent with the best interests of the reserve.

Similarly, the *Forest Service Atlas* for 1907 (p. 20) indicated that permits for boating, fish hatcheries,

continue to this day. In 1906, the Gila National Forest was visited by 108,700 persons. See *Gila National Forest Recreation Management Plan*, p. 3 (1964).

²⁰ In the ensuing years funds were appropriated in a number of other Acts for the protection and care of fish and game in the forest reserves. Department of Agriculture Appropriations Act of March 3, 1905, 33 Stat. 861, 873; June 30, 1906, 34 Stat. 669, 683; March 4, 1907, 34 Stat. 1256, 1269. In the March 4, 1907 Act, the Forest Service was further instructed to "care for fish and

hotels, hunting, charecoal pits, cabins, camping, resorts, and trout ponds in the national forests were routinely issued.

In the Appropriations Act of March 4, 1915 (38 Stat. 1101), Congress authorized the Secretary of Agriculture to "permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience." The Act was later amended to provide further that the Secretary should exercise this authority "in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, or other aspects of the National Forests" 70 Stat. 708.

Finally, in 1918, the Forest Service issued a study entitled *Recreation Uses of the National Forests*. After noting that approximately two and a half million persons had entered the national forests during the summer of 1916 for "some kind of recreation" (*id.* at 24),²¹ the study stated that recreation "stands on a par" with the other three major uses of the national forests: timber production, watershed protection, and grazing (*id.* at 27). The study concluded with the observations that "[h]istorically it appears that National Forests were first created for purposes of recreation, and that this use is traditionally universal," and that "[a]ctually it appears that

game supplied to stock the national forests or the waters therein." 34 Stat. 1270.

²¹ As the study noted (*ibid.*), this total was based on a count of entries and probably counted many individuals more than once.

the National Forests of the United States have always been extensively used for recreation * * * (id. at 36).

As this brief survey shows, Congress was well aware of the recreational purposes that the national forests were serving from the time they were first established. In light of the repeated congressional recognition—and, indeed, promotion—of recreational uses of the national forest lands, the inference is strong that the federal government intended to reserve water rights sufficient to permit these uses to continue. For example, when Congress in 1899 authorized the leasing of national forest lands for hotels near warm springs and appropriated funds for fish and game conservation measures in the national forests (see pp. 47–48, *supra*), it contemplated recreational uses that required water. Presumably the government desired the necessary water to be available when the lands were withdrawn for national forests.

In sum, the legislation of the 1890's compels the conclusion that the government in establishing national forests intended to reserve water not only for the primary purposes of the forests but for the secondary purposes as well, including recreation. And this intent became more firmly established as the years passed. It was well established by 1899, 1905, 1907, 1908, and 1910, the dates of the five Presidential proclamations reserving tracts of land for inclusion in the Gila National Forest.²²

²² See p. 3 and note 2a, *supra*. The first of the proclamations came on March 2, 1899 (reprinted at 34 Stat. 3126). Two days before, on February 28, 1899, the President approved the Act of Congress authorizing the leasing of land near springs in national forests for resort hotels (30 Stat. 908; see p. 47, *supra*). One day

Even if the congressional intent were unclear from the legislative materials, the contemporaneous and consistent pattern of administrative practice under the legislation of the 1890's compels the inference that Congress intended the national forests to serve purposes beyond those specifically mentioned in the Organic Act. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16. This is particularly so when the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, quoted in *Udall v. Tallman*, 380 U.S. 1, 16. Such deference is even more justifiable if the consistent administrative practice has been accompanied, as here, by apparent congressional ratification in the form of implementing

later, on March 3, 1899, the President approved the Forest Service Appropriation Act directing forest agents to aid in the protection of fish and game in the national forests (30 Stat. 1095; see p. 48, *supra*). The contemporaneity of these actions illustrates that Congress contemplated recreational purposes for the national forests at the time that even the first reservation for the Gila National Forest was made. (With respect to warm springs, it is relevant that the Gila Hot Springs, located in the Gila National Forest—though not in the watershed of the Mimbres—were a well-known attraction predating the establishment of the Forest. This alone refutes the holding of the New Mexico Supreme Court (A. 241) that "[r]ecreational purposes * * * were not contemplated" for this Forest.)

enactments consistent with the administrative interpretation. *Saxe v. Bustos*, 419 U.S. 65, 74; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140; *Massachusetts Trustees v. United States*, 377 U.S. 235, 241; *United States v. Zucca*, 351 U.S. 91, 96.

2. *The state supreme court's "use"-“purpose” distinction*

The New Mexico Supreme Court dismissed the claim of the United States to reserved Mimbres water for recreational purposes by asserting a distinction between the “uses” and the “purposes” of national forests, pointing out that if mere “uses” such as recreation conflicted with the “purposes” set out in the Organic Act, “those secondary uses would not be permitted to continue” (A. 238-239). While it is true that recreational uses of the forest could never properly take precedence over the primary purposes of improving and protecting the forest, securing favorable conditions of water flows, and furnishing a continuous supply of timber, it does not follow that recreational uses were not intended as secondary purposes when the withdrawal of national forests was authorized.

The “use”-“purpose” distinction obscures the basic question whether Congress envisioned the role of the national forests as including recreation and whether water was therefore implicitly reserved for that purpose. In this case, as the legislative and historical materials demonstrate, the “uses” of national forests for recreation were known to Congress throughout the pe-

riod in which the national forests were authorized and created. Moreover, the evidence indicates that Congress intended that the national forests be used for these purposes, along with the primary purposes set out in the Organic Act.

This Court stated in *Cappaert v. United States*, *supra*, 426 U.S. at 139, that “when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.” There is no reason to suppose that the Court meant to limit the reserved water rights to the primary purposes of the reservation, foreclosing for lack of water all secondary purposes that were within the original contemplation.

3. *The Multiple-Use Sustained-Yield Act of 1960*

In the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528 *et seq.*, Congress gave explicit recognition to the traditional use of national forests for outdoor recreation and other secondary purposes. The Act provides, in relevant part (16 U.S.C. 528):

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in [the Organic Act of 1897].

This Act confirmed and made explicit the policy recognized since passage of the Organic Act—that in order to justify the establishment of a national forest, at least one of the purposes expressly set out in the Organic Act had to be present, but that once that condition was met supplemental purposes were envisioned as well. Both the House and Senate Reports accompanying the 1960 Act made the point clearly:

[I]n any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. Rep. No. 1551, 86th Cong., 2d Sess. 4 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess. 4 (1960).

The House and Senate Reports also made it clear that Congress did not mean to alter policy with the 1960 Act, but only to make explicit what had long been implicit in the statutory and administrative framework. The Reports noted:

The Act of June 4, 1897 (30 Stat. 35), refers both to watersheds and timber as purposes for which the national forests are established. Through the years by a number of con-

gressional enactments, including appropriations for carrying out specific activities and functions, through court decisions, and through policy directives and statements, the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted.

H.R. Rep. No. 1551, *supra*, at 2-3; S. Rep. No. 1407, *supra*, at 3. Enactment of the 1960 bill, the Reports stated, "would continue this policy." *Ibid*.

The New Mexico Supreme Court concluded that the Multiple-Use Sustained-Yield Act of 1960 "can just as easily be interpreted" in a contrary fashion (A. 240). By the court's reading, Congress in the 1960 Act must have been devising new purposes for the national forests, else it would not have called these purposes "supplemental" (*ibid.*). This view is inconsistent with the legislative history of the Act, which states the congressional intent to continue longstanding policy. Moreover, it ignores the fact that two of the "supplemental" purposes of national forests stated in the 1960 Act are "timber" and "watershed" (16 U.S.C. 528, quoted at p. 53, *supra*). Since these purposes are also encompassed in the Organic Act, no matter how narrowly that Act is read, the court's assumption that the "supplemental" purposes could not have been original purposes has no validity. The 1960 Act is more properly read as a statement of the whole range of specific purposes, both primary and secondary, that Congress considered to have tradi-

tionally been implicit in the legislative and administrative policies governing the national forest system.

4. *Substantial consumptive recreational use*

The special master, after concluding that the reserved waters of the Mimbres were available for "recreational uses incidental to hiking, fishing, camping and hunting," added in his Conclusion No. 12 that until the enactment of the Multiple-Use Sustained-Yield Act of 1960, Congress had not authorized the use of water in national forests for "substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses" (A. 198). The United States objected to Conclusion No. 12 on two grounds: that it assumed that the 1960 Act had altered legislative policy with regard to the purposes of the national forests; and that the conclusion was premature, since the United States did not have any substantial impoundments of water in the Mimbres watershed and had no present intention to impound or use substantial amounts of Mimbres water for recreational purposes in the future (A. 151-152). Since the state district court held that the United States had no reserved right to use water of the Mimbres for any recreational purpose, the special master's Conclusion No. 12 became superfluous and was omitted from the court's decision.

Because the New Mexico Supreme Court affirmed the district court's conclusion denying a reserved right for any recreational use, the only question before this Court concerning recreation is whether the United

States is entitled to any reserved waters for recreational purposes. Nonetheless, because the State has raised the spectre of large consumptive recreational uses, we note that the United States has not claimed and does not now claim reserved Mimbres water for such purposes. The recreational claims of the United States in this case are limited to modest water uses of the sort identified in the special master's Conclusion No. 11 (A. 198): "recreational uses incidental to hiking, fishing, camping and hunting" (see p. 41, *supra*).

B. THE NEW MEXICO SUPREME COURT ERRED BY DENYING THE UNITED STATES RESERVED WATER RIGHTS FOR THE PURPOSE OF STOCKWATERING

Livestock have grazed over the lands of the Gila National Forest since long before the National Forest was established. After the creation and expansion of the Forest around the turn of the century, the Forest Service began issuing grazing permits to ranchers, allowing them to use the Forest lands for grazing cattle on a controlled basis. At present, some 160 private ranchers are permitted under revocable permits to run some 29,000 cattle in the Gila National Forest. See United States Forest Service, *Men Who Matched the Mountains: The Forest Service in the Southwest* 204 (1972).

The Forest Service maintains watering facilities for livestock at selected points throughout the grazing areas of the Forest. To control the areas grazed and to prevent overgrazing, the Service opens different stockponds at different times in order to lure the stock to different areas of the forest as grazing con-

ditions vary (A. 85-88). See Forbes, *Forestry Handbook* 11.58 (1961); Roberts, *Hoof Prints on Forest Ranges* 104 (1963); see generally Frome, *The Forest Service* 55-57 (1971). In the past, the Forest Service has used water from the Mimbres to fill stockponds in the Forest. Because it has always been assumed that the United States had a reserved right to that water for this purpose, the Forest Service has been able to select its permittees, and to revoke their permits and select new ones if they violate the rules,²³ without having to contend with conflicting water-rights claims among past and present permittees.

By denying the United States any reserved water rights for stockwatering purposes, the New Mexico Supreme Court has disrupted the Forest Service's grazing control program. Under the state court's decision, if the Forest Service seeks to transfer a grazing permit from one rancher to another, it may not transfer watering rights along with the permission to graze. Instead, the new permittee may be faced with prior appropriation claims on the part of the former permittee and will be forced to establish his own right to the water, if he can, under state law.

The ruling of the New Mexico Supreme Court on the stockwatering issue was erroneous, both because grazing has been historically a secondary purpose of

²³ The grazing permit regulations of the Department of Agriculture specifically provide for revocation of permits for non-compliance with "the provisions or requirements in the grazing permit, the regulations of the Secretary of Agriculture on which the permit is based, or instructions issued by Forest Officers." 36 C.F.R. 231.6(a).

the national forests, and because requiring federal permittees to acquire individual water rights to water used by their stock on the national forests would place an unreasonable burden on federal range management and impair federal control of federal lands.

1. *Grazing has always been regarded as a secondary purpose of the Gila National Forest*

Whether stock would be permitted to graze on national forest land was a question of keen interest to the Congress that passed the Organic Act of 1897. Because the Creative Act of 1891 had made no provision for entry on forest lands for any purpose, national forest reservations created between 1891 and 1897 had been closed to grazing. During the debates over the Pettigrew Amendment, several congressmen commented on the hardship that this had produced among ranchers in the West. See 30 Cong. Rec. 1006 (1897) (Rep. Ellis); 30 Cong. Rec. 1011 (1897) (Rep. De Vries). See also, Roberts, *supra*, at 21-24.

In response to these concerns, Representative McRae expressed the hope that the forest management authority contained in the Pettigrew Amendment would be employed to put the national forests to the best possible uses, including controlled grazing. He stated (30 Cong. Rec. 966 (1897)):

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions, upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to main-

tain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, the mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they were established.

In 1898, a survey of the forest reserves conducted pursuant to a provision of the Organic Act (30 Stat. 11, 34) focused closely on possible pasturage uses of the forests. *Surveys of Forest Reserves*, S. Doc. No. 189, 55th Cong., 2d Sess. 38-39, 48, 119-159 (1898). The survey appraised the effects of different livestock and the different pasturage conditions in various forest reserves, which would require different grazing programs. The survey concluded that "it is the regulation of pasturage within the reserves, not its prohibition, that is required if all their resources are to be rightly developed" (*id.* at 39). Controlled grazing was thus recognized as a legitimate purpose of a national forest under the Organic Act—a secondary purpose, to be sure, but a purpose that the Forest Service was expected to promote under its statutory authority to "regulate [the] occupancy and use" of the forests.

Administration of controlled grazing in the national forests was in effect by 1900. See Hibbard, *A History*

of the Public Land Policies 483-484 (1939). In the Gila National Forest (first established in 1899), as elsewhere, the supervisor issued grazing permits allowing limited grazing within the reservation "in order to equitably divide and save the grazing for future use." *Report of the Governor of New Mexico*, H.R. Doc. No. 5, 58th Cong., 2d Sess. 473 (1903). In *The Use of the National Forest Reserves* (1905), the Service stated that its policy in granting grazing permits was to "allow the use of the forage crop of the reserves as fully as the proper care and protection of the forests and the water supply permit." *Id.* at 20. In *United States v. Grimaud*, 220 U.S. 506, decided in 1911, this Court recognized that it was within the statutory authority of the Forest Service to regulate pasturage on the forests in a manner consistent with the primary objects set out in the Organic Act.

As in the case of recreation, the national forests have thus been used for controlled grazing throughout their history, and the Forest Service has traditionally made water available to its permittees as a means of facilitating and controlling the grazing use of the forest lands. This congressionally approved practice of running stock on the national forests under federal supervision compels the inference that the government intended, when establishing the forests, that sufficient water would be available to accommodate the practice and to enable the Forest Service to carry out its statutory mandate to regulate the occupancy and use of the forests.

2. *Requiring federal permittees to acquire individual rights to water used by their stock on national forest land would place an unreasonable burden on federal range management*

The New Mexico Supreme Court's ruling that the Forest Service permittees must acquire their own rights to the use of forest water for stockwatering purposes would impede federal range management on the national forests. If effective utilization of the forage resources of those forests is to continue, it is important that the control of forest waters used for grazing stock remain in the United States. As we have noted, the Forest Service relies on its ability to divert water into different stockwatering areas as a means of controlling the level and location of grazing in the Forest. In addition, its ability to transfer water use rights to new permittees facilitates the enforcement and effectiveness of its permit program. The imposition of state law requirements on stockwatering uses in the national forest could prevent the Forest Service from controlling those uses and interfere with the Service's ability to manage this national resource.

The Property Clause of the Constitution grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." United States Constitution, Article IV, Section 3, clause 2. As this Court has held, the Property Clause accords to Congress "the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539. *United States v. San Francisco*,

310 U.S. 16, 29-30; *United States v. Gratiot*, 14 Pet. 526, 537-538.

Proceeding under authority delegated by Congress,²⁴ the Department of Agriculture has exercised this federal power to regulate property rights on federal land by instituting its grazing permit program. The operation of that program is premised in part on the assumption that the United States has a reserved right to national forest water used for stockwatering, and that the permittees enjoy the use of that water only by virtue of their status as permittees. The contrary ruling of the New Mexico Supreme Court thus conflicts with measures long before taken by the United States to govern the disposition of property on federal lands.²⁵

²⁴ Congress delegated its power, under the Property Clause, to regulate the occupancy and use of the national forests to the Department of Agriculture. 16 U.S.C. 551. That delegation has repeatedly been approved, and the rules and regulations of the Department have been given the force of statute by the courts. *United States v. Grimaud*, 220 U.S. 506; *Light v. United States*, 220 U.S. 523; *United States v. Hyman*, 463 F. 2d 615 (C.A. 10); *McMichael v. United States*, 355 F. 2d 283 (C.A. 9).

²⁵ The intent of Congress to permit federal regulation that would govern the disposition of national forest water is indicated by 16 U.S.C. 481 (quoted at pp 29-30, *supra*), the provision of the Organic Act that deals with the acquisition of rights to use national forest waters. See Trelease, *Federal-State Relations in Water Law* 76-78 (1971). Although the section does not deal specifically with stockwatering, it evinces a congressional intention not to leave the disposition of national forest waters entirely to state law. Cf. *Federal Power Commission v. Oregon (Pelton Dam)*, 349 U.S. 435, 443-448; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703.

CONCLUSION

The judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted.

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MARCH 1978.

APPENDIX

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (Creative Act) was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. Prior to repeal, that Act provided:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The Sundry Civil Expense Appropriations Act (or Organic Administration Act) of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 473-482, 551, provides, in pertinent part:

[30 Stat. 34-35; 16 U.S.C. 475.] All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act shall be as far as practicable controlled and administered with the following provisions:

(1A)

[30 Stat. 35; 16 U.S.C. 475.] No public forest reservation¹ shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein, or for agricultural purposes, than for forest purposes.

[30 Stat. 35; 16 U.S.C. 551.][²] The Secretary of the Interior³ shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *.

¹ On March 4, 1907, Congress redesignated the "forest reservations" or "forest reserves" as "national forests." 34 Stat. 1269.

² On October 21, 1976, 16 U.S.C. 551 was one of the "statutes * * * repealed insofar as they apply to the issuance of rights-of-way over, upon, under and through * * * lands of the National Forest System * * *." Federal Land Policy and Management Act of 1976, Pub. L. 94-579, Section 706(a), 90 Stat. 2743, 2793. Section 706(b) of the same Act, 90 Stat. 2794, disclaims any intention to affect "the authority of the Secretary of Agriculture under" 16 U.S.C. 551 "except as it pertains to rights-of-way * * *." Issuance of rights-of-way in national forests is now governed by Section 501 of the 1976 Act, 90 Stat. 2776.

³ On February 1, 1905, Congress transferred control of the "forest reserves" from the Secretary of the Interior to the Secretary of Agriculture. 33 Stat. 628, 16 U.S.C. 472.

[30 Stat. 36; 16 U.S.C. 481.] All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE STATE OF NEW MEXICO

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IN THE
Supreme Court of the United States

October Term, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE STATE OF NEW MEXICO

The State of New Mexico does not disagree with the statements of the petitioner pursuant to Rules 40(a) and (b) of the Rules of the Supreme Court.

I. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States not only with rights to the use of that amount of water implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, but also provides the United States with rights to the

use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Forest Service?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain?

II. STATUTORY PROVISIONS

Act of July 26, 1866, ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661; Act of July 9, 1870, ch. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52; Desert Land Act of March 3, 1877, ch. 107 § 1, 19 Stat. 377, 43 U.S.C. § 321 as amended; Act of October 2, 1888, ch. 1069, 25 Stat. 526, 43 U.S.C. § 662; Act of August 30, 1890, ch. 837, § 1, 26 Stat. 391, 43 U.S.C. § 662; Creative Act of March 3, 1891, ch. 561, §§ 17-21, 24, 43 U.S.C. §§ 663, 946 as amended, 947, 948, 949 and 16 U.S.C. 471; Organic Administration Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34-36, 16 U.S.C. §§ 473, 475, 482, 551; Act of February 15, 1901, ch. 372, 31 Stat. 790, 16 U.S.C. § 522, 43 U.S.C. 959; Act of February 1, 1905, ch. 288, 33 Stat. 628, 16 U.S.C. § 524; Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§ 528-531. Pertinent text is set forth in Appendix A, pp. 1A to 16A. Some of these provisions were repealed by the Federal Land Policy and Management Act of October 21, 1976, P.L. 94-579, 90 Stat. 2743, as noted in the Appendix.

III. STATEMENT OF THE CASE

This suit was begun as a private action to enjoin allegedly illegal diversions of flood waters of the Rio Mimbres in southwestern New Mexico. The Rio Mimbres is an over-appropriated stream historically providing water for irrigation and mining.

Pursuant to § 75-4-6, N.M.S.A. (1953), the district court ordered the State Engineer to conduct a hydrographic survey

of the Rio Mimbres stream system, and shortly after its completion, the State of New Mexico on the relation of the State Engineer, moved to intervene under the general water rights adjudication provision of § 75-4-4, N.M.S.A. (1953). The Complaint-in-Intervention names as defendants all of the known claimants to the use of the stream system water and prays that each of them "be required to appear before Court and describe fully and in detail what rights, if any, they claim to the use of water. . . ." (A. 18). On July 31, 1970, New Mexico's motion to intervene was granted, effectively transforming the original action into a statutory, stream-system adjudication.

Among the named defendants-in-intervention was the United States of America, joined pursuant to the McCarran Amendment (Act of July 10, 1952, 66 Stat. 530, 43 U.S.C. 666). On Aug. 2, 1971, the United States filed its Answer to Complaint-in-Intervention, claiming water rights under the reservation doctrine for the Gila National Forest — "for use on such land . . . to the extent necessary for the requirements and purposes of said reservation." (A. 28). At a pre-trial conference held on September 26, 1972, it was agreed between New Mexico and the United States "that the United States has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved." (A. 38).

The Special Master's Decision

Trial was held before the Court's Special Master on April 9, 1973. One of the issues then before the Court was whether the reserved rights of the United States would have to be quantified like all other rights. The United States put on two witnesses whose testimony related generally to the difficulties of cataloging and describing all of the water uses made in the Gila National Forest. As to the present uses made in the forest, an inventory was begun in 1970 and revised and completed just prior to trial. (A. 59). While the inventory of water uses did not

distinguish between private uses made by permittees and uses made by the Forest Service (A. 53-54), it became the basis of the Special Master's Finding No. 2, listing all of the present water uses within the Mimbres drainage of the Gila National Forest. (A. 192-193).

With respect to the water uses being made by forest permittees, the Master concluded that any "water rights arising therefrom should be adjudicated to the permittee and not to the United States." (Conclusion No. 9, A. 198).

The Master made findings and conclusions respecting two other classes of reserved right claims. On the basis of a shortlived concession by New Mexico, he concluded that "among the uses to which waters of the Mimbres River Stream System . . . may be properly put are recreational uses incidental to hiking, fishing, camping and hunting." (Conclusion No. 11, A. 198). Based upon evidence of the Forest Service's intention to build two recreational lakes in the headwaters of the Rio Mimbres (A. 91-100), the Master distinguished between diminutive and substantial water uses for recreation, the latter of which he determined were not authorized until the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960. (Conclusion No. 12, A. 198).

With respect to minimum instream flows the United States claimed that reserved rights were necessary to assure flows of two cubic feet per second on three separate tributaries of the Mimbres for "fish purposes" to protect an endangered species of Gila Trout. (A. 89-90). At trial it had become apparent that there were private lands within the forest upstream of the claimed instream flows (A. 109), and at a subsequent hearing on March 6, 1974, respecting the instream flow claims it was stipulated that there were no appropriative water rights appurtenant to the upstream lands.

In principle the Master agreed with New Mexico that rights to minimum instream flows could only be utilized in derogation of private appropriators, but in the limited circumstance where

such rights could be utilized only in derogation of *transferred* appropriative rights (i.e., a change in place of use under New Mexico law to the upstream private lands, thus creating the situation where the Forest Service could theoretically call priority and shut down the transferred use), the Master reached the following conclusion of law:

In view of the fact that there are no appropriators upstream of the instream uses . . . , and . . . because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amount of 6.00 cfs . . . (Master's Conclusion No. 10, A. 198).

Subsequent to trial the United States had urged that the Master recognize reserved rights for minimum instream flows by taking judicial notice "that these live streams not only supported fish but served other valid purposes such as erosion control, fire protection, watershed protection . . . wildlife habitat protection, aesthetics, etc." (A.206). The only evidence in the record in support of the United States' minimum flow claims is testimony on the need to maintain the tributary streams for "fish purposes." The Master's Findings of Fact and Conclusions of Law of May 5, 1975, show no judicial notice of other grounds for minimum flows, as would have been required by New Mexico law.

The District Court's Decision

Upon objections to the Master's Report, New Mexico contended that the United States was not entitled to reserved rights for minimum instream flows, for recreational uses of any

kind, or for other kinds of water uses made by private users and permittees of the forest.

With respect to the three minimum flows for fish purposes recognized by the Master, the United States argued that "as the purposes for these uses, instead of simply listing 'fish,' there should be added, as purposes, the following: erosion control, fire protection, watershed protection, maintenance of natural flow, wildlife habitat protection, aesthetics, etc. . . ." (A.207). New Mexico responded by noting that "the United States is asking the court to ignore the record and the evidence at trial (and) to substitute new 'purposes' for the claimed instream uses. . . ." ¹ The district court concluded that "the United States does not have reserved rights to minimum instream flows based upon the purposes for which the Gila forest lands were withdrawn from the public domain." (Conclusion No. 11, A. 231).

The district court also concluded "(t)hat recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain. . . ." With respect to the uses listed in the Forest Service inventory, "where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom should be adjudicated to the permittee under the law of prior appropriation and not to the United States." (Conclusion No. 9, A. 230). As to livestock grazing the United States has stated that "the Forest Service permittees who (are) allowed to graze livestock inside

1. The United States apparently now disputes this sequence of events. Cf., Supplemental Brief of the State Of New Mexico in Opposition, January 4, 1978. The Master, of course, could not have judicially noticed additional forest purposes (legal conclusions) or a demonstrable need for reserved rights to instream flows for such purposes. On the contrary, he concluded that insofar as water was concerned that the express purposes of the Gila National Forest require the forest administrators to manage "the watershed in such a way as to maximize the water yield to downstream appropriators," i.e., appropriators under state law. (Conclusion No. 10, A. 198).

the forest would have to establish their own rights to the use of Mimbres water under state law." (Brief for the United States, p. 6). None of the listed uses, however, would require a water right in New Mexico.

The New Mexico Supreme Court's Decision

The United States' statement with respect to the decision of the New Mexico Supreme Court is essentially correct.

IV. SUMMARY OF ARGUMENT

I

While there is no dispute over the principle that the United States is entitled to the reserved water rights implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, the parties disagree as to the extent of the principle's application.

In the late 19th century the United States severed the waters of the West from the public domain and relinquished plenary control over those waters to the western states. In 1963, however, the Court announced that the United States' relinquishment was not as complete as western water users had been led to believe. During the interim appropriators under state law believed that water was available to make their appropriations. They could not have reasonably expected that a paramount interest in the same water might be claimed in the future.

Federal reserved water rights and appropriative rights vested under state law contradict one another. The ten western states appearing as *amici curiae* in this case are keenly aware of the problem. The situations of Twin Lakes Reservoir and Canal Company and Phelps-Dodge, Inc., also appearing as *amici curiae*, illustrate the problem.

New Mexico believes that this Court, as well, has recognized that the development of the reservation doctrine

discloses an anomalous jurisprudence in western water law. Accordingly, in our view, the Court has restricted the scope of the United States' reserved rights to a strict standard of necessity. (*Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2060 (1976)). Such a standard is wise and represents sound national policy.

II

Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L. Ed.2d 542 (1963), is still an active case. New Mexico is a party. The case involves the equitable apportionment of the waters of the Colorado River; the Gila River, which rises in the Gila National Forest in New Mexico, is tributary to the Colorado.

In the text of his Report in *Arizona v. California*, the Special Master expressed an opinion about forest uses, calling the uses forest purposes. He made no findings or conclusions respecting national forest purposes, and none of the parties addressed them in briefs or argument. The question of forest purposes was neither litigated nor determined, and New Mexico is not collaterally estopped from litigating the question now.

III

New Mexico believes that reserved rights arise in satisfaction of the statutorily prescribed purposes for which the Gila National Forest lands were withdrawn from the public domain. The United States agrees, but additionally asserts that reserved rights arise to serve individuals making private recreational and grazing uses of the forest lands as permittees. The United States does not explain why reserved rights do not arise for the many other private uses of water made within the forest.

It is also New Mexico's view that the purposes for which

forest lands might be withdrawn are limited in the Organic Administration Act of 1897 to improvement and protection of the forest lands in order to secure favorable conditions of water flow for appropriators under state law and to provide a continuous supply of timber products. The United States believes that improvement and protection amount to an independent, third purpose. The United States also believes that forests could be reserved under the Act for recreation, aesthetics, and fish and wildlife preservation. The legislative history of the Creative Act of 1891, the Organic Administration Act of 1897, numerous federal rights-of-way statutes, the National Park Service Act, and the Multiple-Use Sustained-Yield Act of 1960 belies the United States' position.

The legislative history of the principal forest and water legislation in the late 19th century demonstrates that New Mexico's view is correct. The history, however, is lengthy and complex. The United States' approach to this history is desultory and superficial and fails to address all but one of the statutes specifically dealing with forest waters. New Mexico has treated the legislative history completely.

New Mexico recognizes that there is reason to be attracted to the United States' claims, but we believe the attraction is naive. In this day and age one would think that forest reserves are far broader in purpose and design than they are. In 1897 Congress firmly endorsed an economic principle of use of forest resources, especially forest waters, in an attempt to foster the economic development of the West. Based on this policy considerable development has occurred. Today, however, economic expansion and development of resources is much less a part of American ideology than it was in the 1890's, and it is easy to overlook the exigencies of the past. The statutes treating the use of waters in national forests must be understood contemporaneously. The United States, instead, wishes to impress modern values on the past. In so

doing, the United States' analysis of the legislation, its history, and its administrative construction is misplaced.

V. ARGUMENT

POINT I

THE PRINCIPLE THAT RESERVED RIGHTS ARE RESTRICTED TO MINIMAL NEED DERIVES FROM SOUND NATIONAL POLICY.

In his opinion in *United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), in which this Court held that the McCarran Amendment embraces the adjudication of reserved rights, Justice Douglas noted that any subsequent "*collision between (appropriative rights and any reserved) rights of the United States*" would generate "federal questions which, if preserved, can be reviewed here. . . ." (*Id.*, 401 U.S. at 526, emphasis added). While those remarks were limited to a different procedural context, the collision between state-created, appropriative rights and federal reserved rights has a broader conceptual impact. As a practical matter, to the extent that reserved rights are recognized, rights created and vested under state law may be diminished. An understanding of this antagonism is essential to the consideration of the scope of the reservation doctrine as it applies to withdrawals of land from the public domain for the creation of national forests.

The antagonism developed historically. During the middle 1800's title to most of the land in the American West had been ceded to the United States by various foreign powers, and until the latter part of the century, it remained in the public domain; that is, it was unencumbered, federally-owned property, subject to sale or other disposition and not reserved or held back for any special governmental or public purpose. There were no private rights in the federally-owned land: miners and others drawn to the West simply took up residence where they saw fit,

acquiring at best possessory interests to the land as implied licensees. While water was being diverted for mining, agricultural, and domestic uses, there was no federal water law governing its use. The United States simply acquiesced in the incipient development of local water law. (See, S. Weil, *Water Rights in the Western States* § 94 (1905)).

The need for federal legislation with regard to mining and water was obvious, but it wasn't until 1866 that the first law was enacted:

Be it enacted that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . . subject to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States

. . . Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same (Act of July 26, 1866, ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661 (1970)).

In 1870 the federal government made it clear that grantees of the United States would take their lands from the public domain charged with any existing servitudes. The Act of July 9, 1870, ch. 235 § 17, 16 Stat. 218, provided that "all patents granted, or preemption or homesteads allowed, shall be subject

to any vested and accrued water rights, or right to ditches and reservoirs used in connection with such water rights . . ."

Finally, Congress passed the Desert Land Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, 43 U.S.C. 321 as amended, which, according to this Court, "effected a severance of all waters upon the public domain, not heretofore appropriated, from the land itself." *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). Concluding, the Court said:

We hold that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, . . . with the rights in each (state) to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.' (*Id.*, 295 U.S. at 164).

This passage is often cited for the proposition that the Acts of 1866, 1870, and 1877 effected a complete cession of the government's control over all of the non-navigable waters arising on the public domain to the western states, thus, by implication, leaving no water for the government with which to operate its various enclaves which had been or might be carved out of the public domain.

In 1908, however, the Court decided *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, where it was held that when the United States withdrew lands from the public domain in order to establish the Ft. Belknap Indian Reservation, it also impliedly withdrew from the then unappropriated waters of the Milk River sufficient waters to satisfy the purposes for which the lands were withdrawn. "The

power of the Government to reserve the waters and exempt them from appropriation under the state laws," the Court concluded, "is not denied, and could not be." *Winters*, 207 U.S. at 557, citing *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899). The Court reasoned that the United States would not have created a reservation of public lands for the essential purpose of enabling the Indians to become wise in the ways of husbandry without implicitly providing the necessary water.

Between 1908 and 1955, the *Winters* doctrine (or reservation doctrine) underwent only one change. In *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939), where the Pahute Reservation had been set aside not by treaty but by departmental action in 1859, the court, in the spirit of *Winters*, held that there was "no reason to believe that the intention to reserve needs be evidenced by treaty or agreement." (*Id.*, at 336). Until 1955 application of the *Winters* doctrine was restricted to Indian Reservations. The United States treated its non-Indian reservations from the public domain differently. Typically, Congress authorized the appropriation of federal money in order to secure, pursuant to state law, the water rights necessary to the operation and administration of other federal land reserves. (See, e.g., Department of Agriculture Organic Act of September 21, 1944, ch. 412, title II, § 213, 58 Stat. 737, 16 U.S.C. § 526 (1970)).

In 1955, however, the Court surprised the western legal community by seemingly expanding the *Winters* doctrine so that it applied to all withdrawals of land from the public domain:

In *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955), the Court confirmed the Commission's grant of a license to a private power company to build a dam across the Deschutes River in Oregon over

the protests of that state's Fish and Game Commission. State consent to the project was withheld on the ground that the proposed dam would interfere with the migration of salmon and steelhead. The Deschutes was conceded to be non-navigable and the authority of the Federal Power Commission rested on the fact that the dam would be constructed on federal land, on one side of the river an Indian reservation, on the other a power site reserved in 1909. The Court ruled that the property clause of the Constitution gave the federal government the right to issue the license without the concurrence of the state. Oregon claimed that the water sought to be impounded by the dam was under exclusive state control, relying primarily on the Desert Land Act of 1877 (43 U.S.C. § 321) (1964), which had been said to sever the waters from the western federal public lands and to subject all non-navigable waters to the laws of the states and territories. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). This act, the Court held, was not applicable to the lands before it, because they were "reservations," not "public lands," which are lands open for sale and disposition to the public.

Actual water rights were not involved in the case. The company had no state water right for the project, and the license does not purport to grant a federal right. Nevertheless, it is generally assumed that the power company is now exercising the right of the United States to use the water which it reserved from the jurisdiction of the State of Oregon when it reserved the

power site. (Frank J. Trelease, *Federal-State Relations in Water Law*, National Water Commission Legal Study No. 5, pp. 105-106 (1971)).

With the so-called *Pelton Dam* decision, there was a definite suggestion that the once provincially Indian *Winters* doctrine was suddenly expanded to include any reservation of lands from the public domain, whether for Indians, power sites, national forests or some other reservation. The suggestion was clarified in 1963 when this Court held that the "principle underlying the reservation of water rights for Indian Reservations (is) equally applicable to other federal establishments such as National Recreation Areas and National Forests." *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).²

The antagonism between state-created, appropriative rights and federal reserved rights goes beyond the obvious fact that the reservation doctrine takes away from what was thought to have been relegated to the plenary control of the states. With respect to national forest lands the antagonism derives from the

2. Following *Pelton Dam*, the United States changed its position with respect to federal water claims. It had been the policy of the United States to adhere to appropriation law whenever it became necessary to assert water claims for non-Indian reservations. For example, in 1936 the Forest Service policy was the same as that of other agencies and national institutions: "Rights to the use of water for National Forest purposes will be obtained in accordance with State law." *Forest Service Manual* (1936).

The Agriculture Organic Act of Sept. 21, 1944, ch. 412, title II, § 213, 58 Stat. 737, 16 U.S.C. § 526 (1970), specifically authorized appropriation of funds "for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests." In New Mexico the United States Forest Service proceeded under state law as late as 1955, obtaining in that year two State Engineer permits, numbered 2844 and 2868, authorizing the appropriation of some 2.5 acre feet each in the Gila National Forest.

fact that appropriators under state law had no notice -- even by fiction -- of competing federal interests until 1963, i.e., they believed that water was available to make their appropriations, and they could not have reasonably expected that a paramount interest in the same water might be claimed in the future. Secondly, the reservation doctrine provides enough water to satisfy future as well as present water requirements, thus, in a fully appropriated system such as the Mimbres, permitting the United States to make new appropriations with the priority of the original withdrawal, effectively taking without compensation all rights predicated upon intervening uses. In short, the development of the reservation doctrine discloses an anomalous jurisprudence in western water law.³

In view of this internally antipathetic situation, the State of Nevada recently argued to this Court that the reservation doctrine should be characterized as "an equitable doctrine calling for a balancing of competing interests." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, ____ L.Ed.2d ____ (1976). In *Cappaert* it was urged that *Pelton Dam* should be overruled, and the argument was rejected. However, noting that the reservation doctrine is based on necessary inference (*Arizona v. California*, 373 U.S. at 600-601), this Court held that "(t)he implied-reservation-of-water doctrine . . . reserves

3. See Corker, "Water Rights and Federalism -- The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604 (1957); Bradshaw, "Water in the Woods: The Reserved Rights Doctrine and National Forest Lands," 20 Stan. L. Rev. 1187 (1967).

Even the Forest Service recognizes the compensation problem. Section 2541.14 of the *Forest Service Manual* reads:

In drainage where water has been completely appropriated under state law, subsequent to the reservation date, use of water for National Forest system purposes will be expanded on a more careful evaluation of all water uses and needs to fully justify such expansion. (A. 69).

In the eyes of the western states, "careful evaluation" by forest administrators is a poor substitute for compensation.

only that amount of water necessary to fulfill the purpose of the reservation, no more." While Nevada's argument was rejected, it is likely that its philosophical basis -- viz., the antagonism between state appropriative rights and the federal reservation doctrine -- was not forgotten when the Court limited the doctrine's application to "minimal need." (*Cappaert*, 401 U.S. at 141). Wisely, the Court sought to minimize the conflict.

To have done otherwise would have been to articulate a principle of law most conspicuous for its inherently Kafkaesque nature. The circumstances demanded a limiting principle.⁴ In *United States v. District Court for Eagle County*, *supra*, the Court noted that "(t)he reservation of waters may be only implied and the amount will reflect the nature of the federal enclave." (401 U.S. at 523). In 1971, however, the collision had not occurred. It did occur in *Cappaert*, and the Court confronted the problem by further limiting the reservation to "minimal need, no more."

This case will illustrate the collision profoundly.⁵ It is the

4. The fact that the exercise of the reservation doctrine can effectively condemn state-appropriative rights had received considerable, though unconsummated, legislative treatment. See e.g., Moss Bill, S.28, 92nd Cong., 1st Sess. (1971); Hosmer Bill, H.R. 2312, 92nd Cong., 1st Sess. (1971); Kuchel Bill, S.1636, 89th Cong., 1st Sess. (1965); and the Barrett Bill, S.863, 84th Cong., 2nd Sess. (1956).

5. See, esp., the *amici curiae* briefs of Twin Lakes Reservoir and Canal Company, the Southwestern Colorado Water Conservancy District, and Phelps-Dodge, Inc. .

Subsequent to the Court's decision in *Eagle County* and its companion, *United States v. District Court In and For Water Division No. 5, et al.*, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), the reserved right claims of the United States were adjudicated in Colorado. Attached hereto as Appendix B is the Master's memorandum decision in Water Div. No. 5. The Master in that case is Michael White, a visiting professor of water law at Denver University. His decision, of course, is unpublished and is now pending before the Colorado district court on the objections of the United States. The decision, however, contains a scholarly, carefully considered, and highly articulate discussion and resolution of the same issues now before this Court. It is appended hereto because it would not otherwise be available to the Court.

position of New Mexico that the holding and logic of *Cappaert* are of value in this case. We submit that the New Mexico Supreme Court correctly determined the purposes for which the Gila National Forest was established and properly recognized reserved water rights predicated upon the minimal need principal enunciated in *Cappaert*.

POINT II

THE PURPOSES FOR WHICH FOREST LANDS MIGHT HAVE BEEN WITHDRAWN FROM THE PUBLIC DOMAIN WERE NEITHER LITIGATED NOR DETERMINED IN ARIZONA V. CALIFORNIA.

For the first time the United States asserts that New Mexico is collaterally estopped from adjudicating any question relating to the purposes for which lands might have been withdrawn from the public domain to create the Gila National Forest. It argues that "the issue was litigated and determined by a valid final judgment" in *Arizona v. California*, *supra*, a case to which New Mexico is a party, involving the Gila River drainage of the Gila National Forest. (Brief for the United States, p. 21). In argument before the New Mexico Supreme Court the alleged determination in *Arizona v. California* was characterized merely as "judicial authority." (Point III, United States' Brief in Chief).

In its brief before this Court the United States urges that it is New Mexico's position "that the question of the purposes of the Gila National Forest remains open because it was not decided 'specifically' by the Court in *Arizona v. California*, but only by the Master." (Brief for the United States, p. 20). The suggestion is that New Mexico hides behind a technicality. The United States' analysis, however, shows only a superficial reading of *Arizona v. California*.

In *Arizona v. California* the following findings of fact and conclusion of law were made in the Report of the Special Master respecting the Gila National Forest:

Finding of fact 30: In withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the Forest. (Rep. 342).

Finding of Fact 31: There is not sufficient evidence to make a finding of the ultimate water requirements of the Gila National Forest. (Rep. 342).

Conclusion of law 11: The United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used. (Rep. 343).

The Recommended Decree of the Master proposed the following provision on the Gila National Forest:

IV. (E) Provided, however, that nothing in this Article IV shall be construed . . . to affect possible superior rights of the United States asserted on behalf of National Forests . . . ; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used. (Rep. 357-358).

The Master made no findings of fact or conclusions of law on the purposes of the Gila National Forest or other national forests.

In the text of his Report the Master expressed the following opinion:

There are eleven National Forests in the Lower Colorado River Basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering.⁶ (Rep. 96; the footnote is the Master's).

The footnote refers the reader to that portion of the transcript upon which Judge Rifkind was basing his opinion, viz., two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Service. (*Arizona v. California*, Tr. pp. 16014-16015). A reading of Mr. Lyon's testimony clearly indicates that he was talking about forest uses and not the purposes for which forest lands could be withdrawn:

Q: Mr. Lyon, generally what are the uses which are made of the National Forests?

A: The National Forests are used for (Tr. 16014).

It is clear from the transcript that the question of whether recreation and other forest uses are valid forest purposes within the meaning of the Organic Administration Act of June 4, 1897 (16 U.S.C. §475) was neither litigated nor decided.

Furthermore, this opinion on the purposes of national forests is not reflected in any of the Master's findings or conclusions.⁶

None of the findings of fact or conclusions of law proposed by the United States to the Master reveals a consideration of the purposes of the national forests. (See Proposed Findings of Fact and Conclusions of Law, April 1, 1959, Findings 8.1-8.2, 8.34-8.37, pp. 195, 207-208, Conclusion 8.1, p. 211). The United States' Brief in Support of its proposed findings and conclusions stated that:

Although we believe there is no issue in this case respecting these rights of the United States (including reserved rights for national forests), the following brief explanation of the law supporting the existence of such rights is submitted. (Brief, pp. 56-57).

New Mexico in its exceptions to the Master's Report stated that:

Sub-paragraph E of Article IV recognizes the reservation theory as applied to federal lands. New Mexico does not agree in principle with the Winters Doctrine as applied to Indian Reservations nor to the extension thereof to include all Federal Reservations However, New Mexico does not take exception to the specific manner in which the reservation theory is applied in the Report and Recommended Decree involving the equitable apportionment of the waters of the Gila River system. (See New

6. The United States characterizes this explanation as an argument that "the Master's finding was not supported by the evidence." (Brief for the United States, p. 21, n. 10). It should be obvious, however, that our point is simply that the matter wasn't litigated.

Mexico's Exceptions to the Report and Recommended Decree of the Special Master, pp. 2-3).

The only exceptions to the Master's findings and conclusions on the Gila National Forest were filed by Arizona. (See Arizona's Motion for Adoption, With Exceptions, of the Special Master's Decree, pp. 20-21, February 27, 1961). Arizona objected to the Master's finding of fact 30 and conclusion of law 11. The briefs on Arizona's exceptions did not consider the purposes of the forest as an issue, but instead addressed the fundamental question of whether the Gila National Forest had any rights under the reservation doctrine. (See Opening Brief for Arizona, pp. 192-198; Answering Brief of the United States, pp. 76-79; Reply Brief for Arizona, pp. 69-74).

Nowhere in the findings and conclusions proposed by the parties to the Master, the Master's findings and conclusions, or the exceptions of the parties to the Master's findings and conclusions is there any discussion, let alone argument, on the purposes of the Gila National Forest. It is therefore difficult to imagine how the United States can argue that the purposes for which the Gila National Forest was established was an issue "litigated and determined" by a final judgment in *Arizona v. California*. Collateral estoppel requires that a right, question, or fact be "distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery" *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48 (1897).⁷

7. While New Mexico believes that the collateral estoppel argument is without merit, the final decree in *Arizona v. California* provides more cogent support on the same principle for the proposition that the United States is collaterally estopped from asserting claims to minimum instream flows in the Gila National Forest. The decree reads: "... that in addition to the diversions authorized herein the United States has the right to divert water from ... the Gila and San Francisco in quantities reasonably necessary to fulfill the purposes of the Gila National Forest. . . ." Article IV (E). (emphasis added).

The Court agreed with the conclusion of the Master that the United States intended to reserve water sufficient for the future requirements of the Gila National Forest. (*Arizona v. California*, *supra*, 373 U.S. at 601). The Court decided to allow the parties to submit the form of decree to carry the Court's opinion into effect, rather than adopt the Master's recommended decree with amendments. (*Id.*, 373 U.S. at 602). The Decree entered by this Court adopted without amendment subparagraph (E) of Article IV from the Master's recommended decree. (*Arizona v. California*, 373 U.S. at 350).

POINT III

THE ORGANIC ADMINISTRATION ACT OF 1897 AUTHORIZES THE PRESIDENT TO WITHDRAW LANDS FROM THE PUBLIC DOMAIN TO CREATE FOREST RESERVES TO IMPROVE AND PROTECT THE FOREST IN ORDER TO INSURE FAVORABLE CONDITIONS OF WATER FLOW AND FURNISH A CONTINUOUS SUPPLY OF TIMBER.

In pertinent part the Organic Administration Act of June 4, 1897, reads as follows:

...No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . (16 U.S.C. §475).

In its brief in support of its petition the United States said:

On its face, this language identifies three purposes that justify establishment of a national

forest . . . : '(1) improving and protecting the forest, (2) securing favorable conditions of water flows, and (3) furnishing a continuous supply of timber.' The (New Mexico Supreme Court), however, discarded without explanation the first purpose and concluded 'that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber.' (Brief in Support of Petition for Certiorari, p. 10).

On June 30, 1897, with the passage of Organic Administration Act fresh in mind, the Department of the Interior agreed with what was to become the decision of the New Mexico Supreme Court: "Public Forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow." (Department of Interior Circular of June 30, 1897, *Rules and Regulations Governing Forest Reserves Established Under § 24 of the Act of March 3, 1891*, reprinted in H. Docs., 5th Cong., 2nd Sess., Vol. 12, 1897 Report of the Secretary of Interior, pp. cix. et. seq.). It was the understanding of the Secretary of the Interior, then charged with the administration of the nation's timber reserves, that the phrase "improve and protect the forest" was a generic statement facilitating the establishment of forest reserves for the purposes of protecting water yield for appropriators under state law and insuring a continuous supply of timber. As codified in the *Rules and Regulations, supra*, it was considered to be only a statement of congressional intent. It was not a separate purpose. This is amply supported by the legislative histories of forest legislation.

In the early and mid-nineteenth century the attitude of the American public toward the nation's forests and timber lands could best be characterized by indifference:

Between 1820 and 1870, the population more than quadrupled; a vast number of farms were carved out of the forest, the timber, in the absence of a ready market, being largely burned. "Pines and oaks were remorselessly felled, and every settlement showed what Flint called a 'Kentucky outline of dead trees and huge logs lying on all sides in the fields.' Underbrush was fired with wanton carelessness, and thousands of acres of valuable timber went up in smoke." Hunters sometimes fired the woods to drive the game into the open. Lumbering became more of a commercial business, with larger mills operating. In 1870, there were in the United States 26,945 lumber manufacturing establishments, employing 163,637 hands who, using capital aggregating \$161,500,273, produced a total product valued at \$252,339,029 -- a greater product than any other manufacturing industry except flouring and grist mills. All this indicates a very effective exploitation of the country's timber resources. (J. Ise, *The United States Forest Policy* 26 (1972)).

Concern for the nation's forest preserves developed slowly. In 1849, the Report of the Commissioner of Patents indicated the first official concern in Washington: "The waste of valuable timber in the United States will hardly begin to be appreciated until our population reaches 50 million. Then the folly and short-sightedness of this age will meet with a degree of censure and reproach not pleasant to contemplate." (*Report, Com'r. of Patents, 1849, Pt. II, 41* cited in Ise, *supra*, p. 31, n. 30). In 1870, the United States Commissioner of Mining Statistics, R.W. Raymond, attacked the destruction of timber in the mining districts of the Rocky Mountain and Pacific Coast states. (H.R.

Exec. Doc. No. 207, 41st Cong., 2nd Sess. 342 (1870)). In the years immediately following, the Commissioner of the Land Office, Willis Drummond, sought to underscore the importance of the protection of the forests of the public domain. (H. Exec. Docs., 42nd Cong., 3rd Sess., Serial Set Vol. 1560; *Annual Report of the Com'r. of Land Office*, pp. 26-27 (1872)).

The first forest legislation in the United States appeared in the Act of March 1, 1817 (3 Stat. 347), subsequently amended by the Act of May 15, 1820 (3 Stat. 607) wherein the President was authorized to take measures to preserve oak timber on public lands for the Department of the Navy.

In Congress, however, sentiment for conservation of the nation's forests and timber lands was overwhelmed by a hostile lobby:

The timber interests had been fattening on government lands, and had become a power in Congress, especially since they were allied with some of the land-grant railroads. Throughout the West, the miners also needed timber in their business, and were therefore opposed to conservation, while even agricultural settlers near the timber districts always felt that they were entitled to free timber, and opposed any restriction on its disposal. Stockmen had no particular interest in the timber lands at this time, but they could be depended upon to line up with the other western men. These four classes included a working majority in most of the western states, and the admission of several new states had strengthened the forces naturally opposed to conservation. (Ise, *supra*, pp. 38-39).

In view of the lack of effective national legislation designed to protect timber stands, the individual states addressed the problem by enacting timber culture laws which offered a cash

premium to encourage the successful cultivation of timber. In the 1870's the nation's railroad companies — heavy users of timber — undertook their own tree planting programs. (1891-1892 California State Board of Forestry *Fourth Biennial Report*).

While Congress continued to do nothing about the rampant destruction of forests, the Secretary of the Interior issued a Circular in 1885 directing regional land offices to investigate any report of forest destruction and to stop all timber cutting on the public lands. Because of inadequate funding and appropriation, however, the Secretary's scheme of enforcement was ineffective. In a weak attempt to address the problem, the Congress in 1873 copied the earlier efforts of numerous individual states by passing the Timber Culture Act "to encourage the growth of timber on western prairies." (Act of March 3, 1873, ch. 277, 17 Stat. 605).

The first serious attempt to control the problem of timber destruction, which had gotten decidedly out of hand by the middle 1870's, was a bill introduced in Congress in 1876 by Representative Fort of Illinois. While the bill was not passed, it was the first piece of national legislation suggesting that forest lands should be reserved from the public domain "for the preservation of the forest of the national domain adjacent to the sources of the navigable rivers and other streams of the United States." (H.R. 2075, 44th Cong., 1st Sess. (1875-1876)).

Until 1878, there was no way to acquire timber lands on the public domain except through fraudulent entries under the Preemption Law, the Homestead Act, and the Desert Land Act of 1877. These were numerous. (See, generally, Ise, *supra*, pp. 48-55). When the government made a serious attempt to enforce laws against timber thievery and trespassing, the western states reacted by introducing in the 1870's a number of bills which would have authorized the citizens of the various western states to cut timber for mining, domestic, and other purposes. (See, e.g., H.R. 563, 41st Cong., 2nd Sess. (1869-70)).

These efforts ultimately resulted in the passage of the Free Timber Act and the Timber and Stone Act of June 3, 1873, which launched the United States on a policy of relinquishing its public domain timber lands to private ownership. Some government officials continued to be outspoken about the wisdom of governmental reservation of timber lands, but the timber on the nation's best timber lands passed to private ownership between 1878 and 1891. The Free Timber Act, for example, enabled the residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana to cut timber for building, industrial, agriculture, mining, or domestic purposes.

The most outspoken denunciations of the Act continued to come from the Secretary of the Interior, Carl Schurz. Speaking of the Free Timber Act, he stated that it was "equivalent to a donation of all of the timber lands to the inhabitants of those states and territories. The machinery of the Land Office is wholly inadequate to prevent the depredations which will be committed." As he saw it, "the legislation (would) stimulate wasteful consumption . . . and lead to wanton destruction," and would cause "the mountain sides in those states and territories (to) be stripped bare." (*Report, Secretary of the Interior, Vols. XIII & XIV, (1878); H. Exec. Docs. 45th Cong., 3rd Sess., Serial Set Vol. 1850 (1878).*)

The denuding of the nation's forests continued. In 1878 President Hayes called for timber preservation (*Report, Secretary of the Interior, pp. 187-197 (1885); H. Exec. Docs. 49th Cong., 1st Sess., Serial Set Vol. 2378, Report of the Secretary of the Interior, pp. 45-46 (1885)*), but it wasn't until the administration of President Cleveland that the government took its first uncompromising position on the enforcement of the nation's timber laws. This sudden, vigorous enforcement of the timber laws, however, did not go without congressional reaction. In 1879 Representative Herbert of Alabama introduced a bill designed to relieve trespassers from

prosecution for previous timber theft. (H.R. 1846, 46th Cong., 1st Sess. (1879)). The bill won the unanimous approval of the House Committee on Public Lands, and in final form it relieved all trespassers from prosecution in any civil suit. (21 Stat. 237).

Plundering of the nation's forest lands continued unabated into the 1880's and finally aroused enough public concern to become the subject of several popular magazine articles. (Ise, *supra*, p. 93). Several forestry associations were also formed during this period, and many states appointed forestry commissioners. The Timber Culture Act of 1878, designed to counter forest destruction by encouraging the private cultivation of timber, was a failure.

By this time, however, numerous private industries and government officials were urging that timber lands should be preserved. In the 48th Congress forest reserve measures were introduced by Senators Cameron of Wisconsin, Sherman of Ohio, Miller of New York, Edmunds of Vermont, and Representatives Deuster of Wisconsin and Hatch of Missouri. In 1887 bills were also introduced by Representatives Markham of California, Joseph of New Mexico, Taylor of Ohio, and Holman of Indiana. (See, e.g., S. 1188, S. 1258, H.R. 5206, H.R. 4811, 48th Cong., 1st Sess., (1883), and S. 2451, 48th Cong., 2nd Sess. (1884)). Finally, in 1891 the Congress passed the Creative Act of 1891, revising the nation's timber laws, and enabling the President to withdraw lands from the public domain as forest reserves.⁸ Despite the 1891 Act, however, wasteful and destructive timber practices continued, albeit in trespass. In the years that followed, the Secretary of Agriculture, among others, urged that Congress pass restrictive and regulatory legislation. (H. Exec. Docs. 53rd Cong., 2nd Sess., Vol. 19, Report of the Secretary of Agriculture, p. 31 (1893)).

8. Creative Act of March 3, 1891 (26 Stat. 1095). The 1891 Act prohibited all entry into the forest reserves, creating exclusive federal enclaves. This feature of the Act and orders promulgated thereunder figure importantly in the framing of the 1897 Act.

In 1892 and 1893 numerous measures were introduced in the House and Senate urging more effective protection of the nation's forest reserves. (H.R. 102, S. 2763, S. 3235, 52nd Cong., 1st Sess. (1892); H.R. 10101, H.R. 10207, 52nd Cong., 2nd Sess. (1893)). After making provision for entry on the forest reserves, the Paddock Bill (S. 3235, 52nd Cong., 1st Sess. (1892)), contained the following provision restricting the purposes for which forest lands might be withdrawn:

§ 3. That the object of the forest reservations shall be to protect and improve the forest cover within the reservations, for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people of the districts within which the reservations are situated.

Senate Report 1002, the original Interior Department endorsement of the Paddock Bill, which was an elaborate, scientifically oriented justification of the proposed forest reserves and later accompanied the introduction of most of the McRae bills, was also explicit in its discussion of the principle which should govern forest reserves:

(C) That the object of the public forest reservations is *twofold*, namely, to maintain desirable forest conditions with regard to water flow and at the same time to furnish material to the communities in their neighborhood. (S. Rep. No. 1002, 51st Cong., 1st Sess. (1889); See, also, H.R. Rep. No. 1593, 54th Cong., 1st Sess. (1895) which accompanied H.R. 119 and included S. Rep. No. 1002). (emphasis added).

Congressman McRae, Chairman of the House Committee on Public Lands, introduced in 1893 his first version of H.R. 119.

(54th Cong., 1st Sess. (1895)). As introduced and debated on the floor, the bill contained the following purposes clause:

§ 2. That no public forest reservations shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.

The accompanying House Report states that the reservations "are not in the nature of parks set aside for non-use, but they are established solely for economic reasons." (H.R. Rep. No. 897, 53rd Cong., 2nd Sess. (1894)). Congressman McRae's remarks concerning purposes of the reserves clearly establish that timber supply and water flow conditions were the purposes for which the forests could be reserved. Congressman Hermann asked McRae:

Then is it not the purpose of the forest reservation act to preserve the timber rather than promote its destruction?

MR. McRAE: Certainly, that is the main purpose of this bill. We desire to further guard and protect the timber from spoilation. (25 Cong. Rec. 2374 (1893)).

Congressman Pickler opposed the bill because under the 1891 Act, the forest reserves were in effect, parks for non-use, and the McRae bill would open them for timber cutting:

MR. PICKLER: But I call the gentleman's attention to the language —

That no public forest reservations shall be established except to improve and protect the forest within the reservation, or for the purpose

of securing favorable conditions of water flow and continuous supplies of timber to the people.

MR. McRAE: That is the only purpose for which any forest reservation ought to be established. The timber should be so cut as to yield more timber to those who are to come after us. * * * *

The bill authorizes the President to establish forest reservations, and to protect the forests "for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people." (25 Cong. Rec. 2375 (1893)). (emphasis added).

In all of the attempted intervening legislation between 1891 and 1897 the "park" purpose of forever preserving the watershed by barring any kind of use at all was abandoned. All of the legislation, including the 1897 Act, was based on the twofold principle of timber protection and watershed management.

Congressman McRae, who had spoken against the 1891 law because it gave the President arbitrary and unregulated discretion in withdrawing forest lands from the public domain, informed the House that his bill restricted this power:

This bill does not increase the authority over the forests, but, on the contrary, further restricts it by declaring the purposes for which reservations may be made. (25 Cong. Rec. 2374 (1893)). (emphasis added).

The language of the Paddock Bill, the McRae Bill of 1893, the Committee Report, and the remarks of McRae on the floor, uniformly construed the purposes for which public lands could

be reserved as forest reserves as the utilitarian purposes of timber supply and securing favorable conditions of water flow. Forest reservations could not be established by the President except for these purposes.

McRae also endorsed the principle of regulated cutting of mature and dead timber in the reserves in order to foster new and vigorous timber growth, while Pickler and Simpson opposed on the theory that, if provided the opportunity to cut at all, the lumbermen would denude the forests. (25 Cong. Rec. 2430, 2432, 2433 (1893)). McRae said:

(The forests) can not be preserved if you leave the ripe trees to decay and die, and the young trees to dwarf for want of room to grow. There is a certain amount of cutting necessary in these forests to make them thrive and prosper. I want them perpetual and continuous . . . I want the forests utilized for all legitimate purposes not inconsistent with the promotion of the growth of the timber cover. (25 Cong. Rec. 2433 (1893)). (emphasis added).

Pointing out that one of the problems with the 1891 Act was that good agricultural lands were included with the reserves, McRae said:

"(W)e seek by this bill to remedy that difficulty . . . (by declaring) distinctly the purposes for which reservations shall be made. The great forests of this country shall be preserved for the main purposes stated in this bill. (25 Cong. Rec. 2435 (1893))."

The McRae bill passed the House December 17, 1894. On the Senate side an amended version of the bill was passed February 26, 1895, with the following purposes clause:

§ 2. That no public forest reservations shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flow and to insure a continuous supply of timber for the people of the States wherein such forest reservations are located; but it is not the purpose of this act to authorize the inclusion within such forest reservations of lands more valuable for the mineral thereon or for agricultural purposes than for timber.

On June 10, 1896, the House again passed H.R. 119. (28 Cong. Rec. 6410 (1896)). The text of the purposes clause is revealing:

That the objects for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be to protect and improve the forests for the purpose of securing a continuous supply of timber for the people and insuring favorable conditions of water flow. (28 Cong. Rec. 6410 (1896)).

This provision clearly shows that the twofold reason for forest reservations was continuous supply of timber and favorable water flow and that the forests were to be protected and improved to accomplish these purposes. Protection and improvement of the forests were not, as the United States claims, self-sustaining objects of forest reservations. Protection and improvement were to facilitate providing continuous supplies of timber and securing favorable conditions of water flow.

The twofold need for timber reservations, i.e., to protect the dwindling timber supply and to provide favorable

conditions of water flows, was discussed at length in the various debates and reports on the numerous House and Senate bills introduced between 1891 and 1897.⁹ McRae repeatedly stated the congressional concern:

Common senses and science, I think will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into streams and gives steadier flow, with fewer overflows and less low water.

As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

⁹ After maintaining that the New Mexico Supreme Court "inexplicably" concluded that forest lands could be reserved under the 1897 Act for essentially two purposes, the United States argued that "(i)n fact, the government claim of reserved water rights for maintenance of minimum instream flows falls squarely within the purpose of "securing favorable conditions of water flows." (Brief in Support of Petition, pp. 10-11). While there is a certain naive attraction to this argument, it is patently wrong for two reasons.

First of all the legislative history demonstrates unequivocally that the object of "securing favorable conditions of water flows" is to prevent floods and erosion by continued, indiscriminate timber devastation. Favorable conditions of water flows, i.e., the physical retention and retardation of precipitation, is accomplished by prudent watershed management.

Secondly, the Court must distinguish between ample stream flows on the one hand, which only God and decent forest management can provide, and on the other, a water right for a minimum instream flow, *the only utility of which is to cut off a junior upstream user whose rights have vested under state law*. As will be discussed more thoroughly below, the real significance of minimum flow rights diametrically contradicts the purposes of our forest reserves.

The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent They are not parks set aside for non-use but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, . . . shall be used, so as not to injure or destroy the primary objects for which they are established. (30 Cong. Rec. 966 (1897)).

Representative Ellis from Oregon emphasized the function of national forests in preserving a water supply, as opposed to maintaining merchantable timber:

(The people of the West) believe in setting apart reasonable reservations near the headwaters of the stream if you please, especially such as afford water supplies to cities, if there be any such

. . . as was well remarked by the gentleman from Colorado (Mr. Bell) yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.

I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the

preservation of the water supply. (30 Cong. Rec. 1006-07 (1897)).

Representative Ellis' remarks were echoed in the same session by Representative Loud from California, whose comments further indicate that the basic concern was to establish and manage forests in order to preserve the waters arising therein for the use of the people below the headwaters:

. . . I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity as it is for the production of the crops of the great San Joaquin Valley.

That is the main object of the forest reserves in the State of California (30 Cong. Rec. 1399 (1897)).

Finally, the "Report of the Committee upon the Inauguration of the Forest Policy" (S. Doc. No. 105, 55th Cong., 1st Sess. (1897)), upon which the Congress relied in considering the Organic Administration Act, emphasized the same twofold principle:

The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century

Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public

domain, for their influence on the flow of streams and to supply timber and other forest products

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western North America is dependent upon irrigation. (S. Doc. No. 105, p. 36, 55th Cong., 1st Sess. (1897)).

Nothing in the debates preceeding the 1897 Act furnishes a conclusion that the forests could be reserved for the purpose of preservation and improvement alone, without reference to timber or water flows. In one of the closing exchanges between Smith of Arizona and McRae the same twofold principle that survived the entire movement of the 1890's is readily apparent:

MR. SMITH: What is the purpose of the reservation?

MR. McRAE: To conserve the water flows and to furnish a continuous supply of timber for the people. (30 Cong. Rec 967 (1897)).

In view of this legislative history there can be no doubt that the restrictive purposes for which timber land might be reserved under the 1897 Act are the same *two* purposes enumerated by the Secretary of the Interior in promulgating the *Rules and Regulations* governing forest reserves on June 30, 1897, just 26 days after the Act was passed. Further substantiating this view is the "Report of the Committee

Appointed by the Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States." On February 15, 1896, Hoke Smith, the Secretary of the Interior, then charged with the administration of the public domain, requested the National Academy of Sciences report to the Department on "a rational forest policy for the forested lands of the United States." (S. Doc. No. 105, p. 7, 55th Cong., 1st Sess. (1897)). Specifically, the Academy was asked:

- 1) Is it desirable to maintain permanently as forested lands those portions of the public domain now bearing wood growth, for the supply of timber?
- 2) How far does the influence of a forest upon . . . water conditions make desirable a policy of forest conservation in regions where the public domain is principally situated?
- 3) What specific legislation should be enacted to remedy the evils now confessedly existing? (S. Doc. No. 105, p. 7, 55th Cong., 1st Sess. (1897)).

In response the Academy drafted a lengthy report which was read to the Congress on May 25, 1897; the report, in its entirety, supports the position asserted by New Mexico in the case at bar. In discussing the Academy's proposed system of forest administration, it was stated that:

(i)t has been shown that the preservation and judicious management of the forests on those portions of the public domain which are unsuited for agriculture are of great importance for the flow of rivers needed for irrigation of arid districts, and to furnish forest products for

settlers on adjacent arable lands, and for mining operations. (S. Doc. No. 105, p. 23, 55th Cong., 1st Sess. (1897)).

As Appendix B to the *Report* the Academy proposed an actual bill which began:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the objects for which public forest reserves shall be established under the provisions of the (1891 Act), shall be to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow. (S. Doc. No. 105, Appendix B, 55th Cong., 1st Sess (1897)).

Like McRae, the principal sponsor of the legislation ultimately adopted three weeks later, and the Secretary of the Interior, then responsible for the administration of the forest reserves, the National Academy of Sciences believed that the object of "improving and protecting the forest" was a generic statement facilitating the establishment of forest reserves for the purposes of protecting water yield for appropriators under state law and insuring a continuous supply of timber. In the twentieth century the same view has been expressed. The Circular of April 4, 1900, containing the Secretary's regulations respecting forest reserves, for example, provides:

2. Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to

continuous water flow. (*Compilation of Laws, Regulations and Decisions Thereunder, Relating to the Establishment of Federal Forest Reserves, Under §24 of the Act of March 3, 1891 (26 Stat. 1095), and the Administration Thereof, 15 (1903), hereinafter cited as 1903 Compilation.*¹⁰)

In response to this century of legislative history the United States urges that the language of the Organic Administration Act identifies three distinct "purposes that justify establishment of a national forest," viz., "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." The first alleged purpose, however, states no goal or object justifying the improvement and protection that the Act solicits. As plain logic and all of the legislative history indicate, it only describes in general the objective that the purposes which followed were

¹⁰ The United States has pointed out that:

'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall v. Tallman*, 380 U.S. 1, 16. This is particularly so when the administrative practice 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and, smoothly while they are untried and new.' *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, quoted in *Udall v. Tallman*, 380 U.S. 1, 16. (Brief for the United States, p. 51).

New Mexico agrees with the legal principle, but believes it supports the decision of the New Mexico Supreme Court instead of the position taken by the United States. If there were a choice, this Court could apply the principle to the rules and regulations promulgated by the Secretary of the Interior or to selective and inconclusive citations to the writings of B. E. Fernow. (See, Brief for the United States, pp. 43-52). Fernow, however, did not address the matter directly. The Secretary did.

intended to achieve. The United States, however, has subordinated syntax to grammatical arrangement, and because the sentence is seemingly structured as a series of three purposes, argues that the first "purpose" exists independently of the second two. However, it tells us nothing about *why* the forests were to be improved and protected.

By no stretch of the imagination could the President have reserved forest lands under the Acts of 1891 and 1897 to protect wildlife habitat or fish. As should be abundantly clear, forests were to be improved and protected for only two reasons. It follows that Congress could not have implicitly intended that water rights would arise except in satisfaction of the two purposes for which the forest lands were withdrawn. Indeed, the very act of withdrawal was designed to protect the forests. The two purposes behind the withdrawals form the genesis of the United States' reserved water rights.

POINT IV

THE UNITED STATES CAN HAVE NO RESERVED RIGHTS TO MINIMUM INSTREAM FLOWS FOR "FISH PURPOSES," WILDLIFE HABITAT, OR AESTHETICS UNDER THE ORGANIC ADMINISTRATION ACT OF 1897, AND THE RECORD CONTAINS NO EVIDENCE OF A NEED FOR MINIMUM INSTREAM FLOWS FOR ANY OTHER PURPOSE

In its introduction to Point III the United States suggests that it has always maintained in this case that "the maintenance of minimum instream flows (is) necessary not only for 'fish' purposes but also for the purposes of 'erosion control, fire protection, watershed protection, (and) wildlife habitat

protection . . . ' " (Brief for the United States, p. 23). The only evidence in the record in support of minimum instream flows, however, is the testimony regarding the need to protect Gila trout (A. 89-90). No other need was envisioned at trial, and no other claim was made. Subsequently, in argument before the district court, the United States urged that the need for instream flows for fish purposes be supplemented in the court's decree by judicial notice of a need for instream flows for the above-mentioned additional "purposes." (A. 207) No such notice was taken — or could have been — by either the Special Master or the district court.

On appeal the United States attempted to persuade the New Mexico Supreme Court that reserved rights to minimum stream flows were implicitly reserved for additional purposes, i.e., "aesthetic, environmental, (and) recreational . . . purposes," despite the fact that there was no evidence in the record demonstrating a need for such rights. Based upon the conclusion that these asserted forest purposes, as well as the previously asserted fish purposes, were not purposes for which the Gila National Forest lands could have been withdrawn from the public domain, the New Mexico Supreme Court concluded that instream uses for these purposes "were not contemplated." (A. 241). The court did not, as the government urges, hold that "the United States ha(s) no reserved rights to water for maintenance of minimum instream flows for *any* purpose." (Brief for the United States, p. 24). (emphasis added). Based upon the record, i.e., the demonstrated needs of the United States, the Court concluded that rights to instream flows cannot exist in satisfaction of purposes other than those expressed in the Organic Administration Act of 1897. With respect to the belated argumentative claim that such rights might be needed to insure minimum stream flows for "erosion control, fire (and) watershed protection," matters conceivably within the ambit of the Organic Act, there was neither evidence nor judicial

notice upon which the Court could have volunteered an opinion.¹¹

As to its presently adjudicated reserved rights it is true "(t)hat the United States does not have rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain." (Conclusion No. 11, A. 231). As to its claims for reserved rights for future needs the matter has not been fully determined.

A. Minimum instream flows for fish and wildlife purposes are not authorized under the Organic Administration Act of 1897.

The Organic Administration Act of 1897 did not authorize the United States to preserve or protect fish and game in national forests. Neither did it authorize federal management, protection, or preservation of wildlife. These matters were left strictly to the states. No reserved rights for fish or wildlife can be implied in the Gila National Forest prior to the enactment of the Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §§ 528-531, because such an implication would be inconsistent with Congress' express intent to leave fish and game management and regulation to the states.

While it is evident from the legislative histories of the Creative Act of 1891 and the Organic Administration Act of 1897 that fish and wildlife purposes were not among the purposes for which the Gila National Forest lands could have

¹¹ As New Mexico earlier pointed out, the United States is not barred from asserting that rights to minimum instream flows might be necessary for erosion control or fire protection on the basis of the recognized purposes of watershed management and the maintenance of timber. (Supplemental Brief of the State of New Mexico in Opposition, p. 4). Indeed, the United States has done so in state court in New Mexico subsequent to the decision below. *State ex rel. S.E. Reynolds v. L.T. Lewis, et. al.*, Chaves County Cause Nos. 20294 and 22600. In this context questions of fact instead of law are raised. Need must be demonstrated.

been reserved, the same conclusion is compelled by other actions of Congress.

In 1893 and 1894 the Department of the Interior requested provisions for the protection of game and natural curiosities within both national parks and forests. (H. Exec. Docs. 53rd Cong., 3rd Sess., Vol. 14, Report of the Secretary of the Interior, Vol. 1, pp. LXXIV – LXXV (1894)). The McRae bill of 1896, H.R. 119, contained such a provision:

§2. That the Secretary of the Interior shall make such rules and regulations and establish such service as shall be required . . . to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be thereon, from waste, injury, fire, spoilation, or other destruction (28 Cong. Rec. 6410 (1896)).

However, the Senate did not pass it in 1896, and the provision was not included in the Pettigrew Amendment as it passed the Senate in 1897. On the House side, Congressman McRae printed his 1896 bill in preparation for offering it as an amendment to the 1897 legislation. It was considered but never enacted. (30 Cong. Rec. 899-902, 924, 988, 1033 (1897)). The Conference Committee report, S. Doc. No. 102, 55th Cong., 1st Sess. (1897), contained no provision respecting game, natural wonders or curiosities, or preservation of the natural resources of the forest reservations.

The omission of the 1896 House version from the final law evinces congressional intent not to authorize the Secretary of Interior to promulgate regulations for the preservation of game. Instead, it shows that Congress decided to leave such regulation within the purview of state administration, absent special legislation.

In 1901 Gifford Pinchot inquired whether under the Act of

June 4, 1897, he could "make such (forest) reserves the refuges for game, in order to its preservation —" (23 Op. Att'y. Gen. 589 (1901)). Construing the 1897 Act and the recent decision of Congress that state laws should apply to fish and game instead of secretarial regulation, Attorney General Knox concluded that "the Secretary of Interior is not authorized to prescribe rules and regulations by which the national forest reserves may be made refuges for game, . . ." (*Id.*, at 594).

New Mexico's view is also supported by other contemporaneous legislation. In 1905, Congress passed the first of a series of seven special acts authorizing the creation of fish and game preserves within specific national forests, indicating Congressional understanding that special legislation was required to create game preserves. Groundwork for this special legislation had been laid in the years 1901 to 1905. In 1901, "(t)he President . . . (had) asked for the enactment of laws creating game preserves in these forest reserves." (Letter from Rep. John F. Lacey to Attorney General Knox, Dec. 5, 1901, reprinted in 1903 *Compilation, supra*, pp. 90-91). Under the sponsorship of Congressman Lacey, H.R. 11584, 58th Cong., 3rd Sess. (1904-1905), became the first of the special acts for this purpose. The House report on the bill recites:

The Wichita Forest Reserve has been set apart in the Wichita Mountains in Oklahoma. This mountainous tract of land is surrounded on all sides with farming lands and has been reserved as a permanent timber reserve. The bill proposes to permit the President of the United States to designate such a part of the said reserve as in his opinion may be proper also as a game preserve for animals and birds. *The President in one of his messages has asked that this authority be given as to all the forest reserves in the United States. He recommended that the Executive be permitted to designate portions thereof as*

havens of refuge for the small remaining portion of our game and birds. Congress thus far has not favorably acted upon any such a general law. (39 Cong. Rec. 284 (1904)). (emphasis added).

If the President requested authority from Congress in 1901 to designate portions of certain forests as game preserves, he cannot be said to have the authority under the 1897 Act to reserve waters for game and fish preserves in general.

The Act of January 24, 1905, 33 Stat. 614, 16 U.S.C. §§ 684-686, furnished the pattern for the special Acts of Congress respecting game preserves within the national forests until 1933.¹² However, President Theodore Roosevelt's request in 1901 for general legislation allowing fish and game preserves within the national forests did not receive congressional attention until 1934. The Act of March 10, 1934, 48 Stat. 400, 16 U.S.C. § 694, was enacted as part of comprehensive fish and game conservation legislation. (See, 78 Cong. Rec. 2010-2011, 3726-3728 (1934)). As was said on the House floor, this law "provides a power in the Government to establish these sanctuaries on forest reserves." (78 Cong. Rec. 3727 (1934)). The law continued to guard the authority of the states over fish and game by providing that no such reserve could be established within a national forest without the consent of the legislature of the state affected. There is no claim that the Gila National Forest has been declared a fish and game preserve under this Act.

To hold that the United States has reserved water rights for for minimum instream flows for fish habitat or game consumption in forest reserves under the 1897 Act would be contrary to the course of legislative and executive construction

¹² Act of June 29, 1906, 34 Stat. 607; Act of June 5, 1920, 41 Stat. 986; Act of June 7, 1924, 43 Stat. 634; Act of Feb. 28, 1925, 43 Stat. 1901; Act of June 3, 1926, 44 Stat. 821, 889; Act of June 22, 1930, 46 Stat. 827; Act of June 13, 1933, 48 Stat. 128. See, generally, 16 U.S.C. §§ 480-488.

of the 1897 Act and the special and general legislation in this area. Forest reserves and game and fish reserves are separate. The claim of reserved water rights for fish and game purposes predicated upon the purposes for which forest lands could be reserved under the 1897 Act is contrary to the explicit Congressional separation of the two.

B. *The United States has not demonstrated a need for reserved rights to minimum instream flows to improve or protect the Gila National Forest in order to secure favorable conditions of water flow or to provide a continuous supply of timber.*

The New Mexico Supreme Court is not the only court of last resort in the western United States which has concluded that the Organic Administration Act authorizes the withdrawal of forest lands for the two purposes of securing favorable conditions of water flows and providing a continuous supply of timber. The Supreme Court of Idaho recently reached the same result:

The United States argues that the phrase "to improve and protect the forest within the boundaries" is a separate and distinct purpose for the creation of national forests and refers not only to the protection of trees, but also to the protection and improvement of the entire forest ecosystem, including fish and wildlife, and the forest's aesthetic and recreational qualities. This argument, however, finds no support in the legislative history of the Act. Despite repeated references in the congressional debates to the need to preserve timber resources and protect watersheds, no mention is made of fish and wildlife or the aesthetic and recreational

qualities of the forests.¹³ *Avondale Irrigation District, et al. v. North Idaho Properties, Inc. and Soderman v. Kackley*, Nos. 12174 and 12482 Consolidated, Supreme Court of Idaho, filed March 15, 1978.¹⁴

In its brief the United States spends a good deal of time referring to the emphasis given by numerous congressmen and others of the need to improve and protect forest lands. (Brief for the United States, pp. 31-36). The United States' analysis of the legislative history, however, is superficial, never once addressing the essential part of the history that tells us *why* Congress wanted to improve and protect forests. The Master in Water Division No. 5 in Colorado shares this view of the United States' analysis:

The United States also contends that the use of the words "...to improve and protect the forest within the boundaries..." see 16 U.S.C. §475, by Congress in its statement of forest purposes somehow expands the original purposes of the forest beyond those of watershed protection and timber preservation. It

¹³ Citing, "e.g., 30 Cong. Rec. 899-917, 963-1010 (1897) (debates preceding the enactment of the Organic Act of 1897); 25 Cong. Rec. 2371-75, 2430-35 (1893), and 27 Cong. Rec. 85-86, 109-15 (1894) (committee report and debates on the 1892 McRae Bill, H.R. 119. This bill which was passed by the House but not the Senate, is the forerunner of and substantially the same as the Organic Act of 1897). See Generally Bassman, the 1897 Organic Act: A Historical Perspective, 7 Nat. Res. Law. 503 (1974)."

¹⁴ As of this writing the decision of the Idaho Supreme Court is unpublished. Consequently, it is printed in part herein as Appendix C for the Court's convenient reference.

claims that this phrase somehow encompasses recreational and other purposes not otherwise explicit in the Act. The Master-Referee does not agree.

First of all, such an interpretation is wholly inconsistent with the cases which have addressed the purposes of the Organic Act. See, for example, *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911); *Light v. United States*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Hunt*, 19 F.2d 634 (9th Cir. 1927); *United States v. Johnston*, 38 F. Supp. 4 (D.W. Va. 1941); *United States v. Shannon*, 151 Fed. 863 (D. Mont. 1907); see also, *Honchak v. Hardin*, 326 F. Supp. 988 (D.C. Md. 1971). Those cases clearly indicate that the essential purposes of the forest expressed in the Organic Act are limited to watershed protection and timber preservation. Forest improvement and protection are merely mechanisms to assure that the forests maintain their value as such.

In addition, the words of the Act themselves are clear as to the meaning of this phrase. At most, the phrase can be read to relate to the need to regulate and protect the forests in order that they may retain their value as protectors of the watershed and sources of timber supply. Nothing in the Organic Act, in 16 U.S.C. §475 or otherwise, hints that the purposes of the forest were to be greater than those. To so interpret the cited phrase would expand the meaning of the Act beyond its own limits and

the interpretations of reviewing courts. (Partial Master-Referee Report, App. B, p. 72b).

While the United States can have no reserved rights for minimum instream flows based upon improvement or protection of the Gila National Forest independent of the purposes for which the forest lands were withdrawn, it does not follow that such rights might not arise *based upon* those purposes. In this regard the United States presented no evidence, apparently unaware of any need for such rights at trial. Instead, it is asserted rhetorically that "(t)he need is not academic, nor the danger unreal." (Brief for the United States, p. 29).

There is no question that the burden of going forward and the burden of proof in this regard were on the United States. (Kinney, *Irrigation and Water Rights* §1554 (1912)). Instead of proving a need, however, the United States simply asserts that reserved rights to instream flows are needed for fire protection and erosion control as if these were facts that cannot be questioned. Not only is there no evidence upon which to demonstrate a need; there is no way to tailor the adjudication decree "to *minimal* need." (Cappaert, 426 U.S. at 141).¹⁵

¹⁵ With regard to fire protection it should be borne in mind that the claim is for an *instream* use and not for a need to *divert* water from the stream to put out forest fires, for which a water right would not be needed in any event. In *State ex rel. S.E. Reynolds v. L.T. Lewis, et al.*, Chaves County Cause Nos. 20294 and 22600, *supra*, the evidence the United States offered with respect to fire protection was designed to show that wet banks don't burn -- not that the water in the stream would stop forest fires. With respect to erosion control it was urged that wet banks and beds would be scoured less easily by heavy runoff. It is not likely that the former assertion would justify shutting down the "private appropriators (who) have long been permitted to remove water from national forest lands for private purposes, including substantial uses such as those involved in mining and irrigation." (Brief for the United States, p. 30). The latter assertion is even less persuasive. The claims of instream flows for erosion and fire control, etc., are matters of fact for trial.

C. *The statutory purpose of securing favorable conditions of water flows contradicts the claim of reserved rights for instream flows.*

While the United States appears to recognize that the preservation of "favorable conditions of water flows" relates to prudent watershed management, i.e., insuring that the forest cover retards and controls precipitation and runoff (Brief for the United States, pp. 37-40), it concludes that the statutory language requires that the water be kept in the streams to the detriment of those persons for whom Congress sought to protect the flows. The United States thus ignores the fact that Congress contemplated private appropriations from the streams. Apparently making reference to the "private appropriators (who) have long been permitted to remove water from national forest lands" (*Id.*, p. 30), the United States explains that "Congress . . . could not have intended that the national forests could be artificially deprived of a minimum natural flow in the forest stream." (*Id.*, p. 40)¹⁶

This argument was also addressed by Mr. White in the Water Division No. 5 proceedings:

The Organic Act itself makes it clear that enhanced water supplies created by the reservation and protection of the forests were to be available for use by appropriators. According to that Act, as now codified at 16 U.S.C. §481:

¹⁶ After losing its attempt to avoid quantification in McCarran Amendment proceedings, the United States has asserted in at least one court that it has a reserved right to the entire natural flow of forest streams. In response, the Idaho Supreme Court commented that "(i)t would be indeed anamalous . . . to infer, as the United States asks (us) to do in these cases, a congressional intent to reserve the entire natural flow of these streams when Congress explicitly authorized and contemplated private consumptive use of these same streams." (App. C, p. 7c).

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The very terms of this section indicate that "all" waters provided by the national forests were to be available for utilization by appropriators for various purposes. Indeed, the Forest Service has followed this dictate by granting to appropriators rights-of-way across forest lands under the Right of Way Act of 1891, 43 U.S.C. §946 *et. seq.*, the Right of Way Permit Act of 1901, 43 U.S.C. §959, and the Forest Right of Way Act of 1905, 16 U.S.C. §524. These rights-of-way have allowed appropriators to enter and take water from the forests in fulfillment of various off-the-forest needs. This is in conformity with the terms of the Organic Act. To say that the utilization of reserved waters to maintain minimum stream flows and lake levels would somehow fulfill the purposes of the forests as stated in the Organic Act would truly be illogical and inconsistent with (its) purposes. (App. B, p. 109b).

The United States cites and discusses one statute relating to the use of waters within the national forests, viz., 16 U.S.C. §481, *supra*. Others deal specifically with forest water.

In the Act of September 2, 1888, 25 Stat. 526, as amended, 43 U.S.C. §664, Congress provided that:

All the lands which may hereafter be

designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject from the passage of this act to entry, settlement, or occupation until further provided by law.

The reservation was effectuated by a General Land Office Circular of August 5, 1889, which states:

The object sought to be accomplished by the foregoing provision is unmistakeable. The water sources and the arid lands that may be irrigated by the system of national irrigation are now reserved to be hereafter, when redeemed to agriculture, transferred to the people of the Territories in which they are situated for homesteads, (S. Rep. No. 928, 51st Cong., 1st Sess., pp. 12-13 (1890)).

The Act removed 1,350,000 square miles of land from entry, stopping all homestead, desert land, or other filings in every state west of the 100th meridian. The Act also reserved to federal control all water sources of the affected public domain. (29 Cong. Rec. 1955 (1897); 21 Cong. Rec. 7271, 7273-4 (1890); S. Rep. No. 928, 51st Cong., 1st Sess., pp. 12-13 (1890)). This reservation of public lands was recommended by Maj. John W. Powell, Director of the United States Geological Survey, as the initial step in the proposed development of a nationally controlled system of irrigation in the arid West. (See, S. Rep. No. 928, 51st Cong., 1st Sess.,

pp. 12-13 (1890); S. Rep. No. 1466, 51st Cong., 1st Sess., p. 58 (1890); *Tenth Annual Report, U.S. Geological Survey, Part II*, pp. 4-8 (1889-1890)).

A sudden and radical departure from national land and water policies (Point I, *supra*), Powell's plan provoked "a perfect storm of indignation from the people of the West. . . ." (29 Cong. Rec. 1955 (1897)). In response, the Senate Special Committee on Irrigation and Reclamation of Arid Lands conducted hearings which resulted in a six volume committee report on March 8, 1890, containing majority and minority proposals for federal laws controlling the development of irrigation. The majority report proposed federal reservation of all waters in the West and delegation of control of intrastate waters to the respective states, retaining in the United States the right to resolve all disputes concerning the storage and distribution of interstate waters. (S. Rep. No. 928, 51st Cong., 1st Sess., pp. 13 (1890)).

The Senate Appropriations Committee held separate hearings, reported in S. Rep. 1466, 51st Cong., 1st Sess. (1890), in which Maj. Powell defended his national irrigation proposals. Powell asserted that national control of the lands to be irrigated, of the location of works, and of distribution of water to the lands, would result in more efficient, systematic irrigation in the West. (*Tenth Annual Report, U.S. Geological Survey, supra*; S. Rep. No. 1466, 51st Cong., 1st Sess. pp. 58, 134-136 (1890)). Opponents pointed out that the impact of Powell's proposals would be impairment of water rights vested under local law, uncertainty and hardship. (S. Rep. No. 1466, 51st Cong., 1st Sess., pp. 60, 64, 71, 74, 117 (1890)). The opponents also took the view that the states should control the waters because Congress did not have the knowledge or experience to legislate the use of water. (21 Cong. Rec. 7272 (1890)).

The Act of September 2, 1888, was repealed in the Civil Sundry Bill for 1891, Act of August 30, 1890, 26 Stat. 391,

43 U.S.C. §662. Thus, the proposal for national control of waters in the West was rather abruptly abandoned, leaving control of the diversion and distribution of waters to the states.

State control of water in the West was not limited to the public domain. Section 18 of the Act of March 3, 1891, 26 Stat. 1095, as amended 43 U.S.C. §946, the same law which provides for the establishment of forest reserves in §24, extended state control of water to the reservations of the United States. Before its repeal in the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793, it provided:

That the right of way through the public lands and reservations of the United States is hereby granted . . . for the purpose of irrigation . . . , to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals . . . ; Provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories. (emphasis added).

Section 18 was part of an omnibus bill prepared by a committee of nine Senators to overhaul parts of the nation's public land law. The extension of state law to federal reservations was designed to provide public use and occupancy of the reservoir sites still withdrawn under the 1888 and 1890 Acts. (29 Cong. Rec. 1948 (1897)). The Act of March 3, 1891 was in part a response to the "crude" provisions of the 1888 reservation law. (29 Cong. Rec. 1948, 1955, (1897)).

The version of §18 first adopted in the Senate referred only to rights of way across public lands; it contained no reference to state control of waters or federal reservations. (21 Cong. Rec. 10454-10455 (1890)). The extension of the rights of way to federal reservations, as well as the provision recognizing state control of waters, were both added in the House-Senate conference version, which was adopted without debate as to §18. The Creative Act. §24 of the bill, was also added in the House-Senate conference. (22 Cong. Rec. 3784-3789, 3831-3833 (1891)). By §§18 and 24 of the 1891 Act, Congress expressly recognized state control of the waters of the forest reservations.

Beginning in 1894, the Secretary of Interior construed the 1891 Act to give the states and territories control of the flow and use of waters within federal reservations under the Act. The Department of Interior Circular of February 20, 1894, provided:

The control of the flow and use of the water is therefore a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands. (18 Interior Dept. Decisions 168, 169-170 (1894)). (emphasis added).

The right of way applicant was required to furnish proof of a water right under state law. (*Id.*, pp. 170-171).

Fifteen days later in *H. H. Sinclair, et. al.*, the Interior Department stated:

Section 18 of the Act of Congress approved March 3, 1891 (26 Stat., 1095), grants the right of way through government reservations

for canals and reservoirs for irrigating purposes, provided they shall not be so located as to interfere with the proper occupation thereof by the government. (18 Interior Dept. Decisions 573 (1894)).

The opinion further states that § 18 of the Act of March 3, 1891:

(r)elegate(s) the matter of *appropriation and control of all natural sources of water supply in the state of California to the authority of that state*. The act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes or irrigation, leaving the disposition of the water to the state. (*Id.*, at 574). (emphasis added).

This departmental construction of the 1891 Act was continued in later decisions and regulations, viz., "(t)he control of the flow and use of the water is therefore, so far as this act is concerned, a matter exclusively under State or Territorial control," through the 1905 Regulations, (34 Interior Dept. Decisions 212, 214 (1905)); and the 1908 Regulations, (cf. 36 Interior Dept. Decisions 567, 568 (1907). 43 C.F.R. § 2802.1-5(b) (1976) requires proof of a state law water right whenever the project for which the right of way is sought involves the storage, diversion or conveyance of water. Under these regulations, the Secretary has required that a state water right be proved by the right-of-way applicant if the right of way "in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes..." (36 Interior Dept. Decisions 567, 568 (1907); cf., 34 Interior Dept. Decisions 212, 214 (1905)).

The administrative construction of the 1891 law was judicially upheld in *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228 (D.C. Cir. 1936), where the Secretary's power under the 1891 Act to require a state law water right as a pre-requisite to granting a right of way was challenged. In state court general adjudication proceedings, the company had been adjudicated to have no water right for the purposes and uses for which it sought the grant of a canal right of way from the Secretary of Interior. On the company's application for mandamus, the refusal was upheld. The court said of the state water right requirement:

Similar requirements existed in earlier regulations. 34 L.D. 212; 30 L.D. 325; 27 L.D. 200; and as early as February 20, 1894, 18 L.D. 168. All these regulations required the submission of evidence of applicant's right to appropriate water under the applicable state laws. It will be observed that *for a period of more than forty years these regulations and requirements have been in force and complied with by applicants for ditch rights under the statutes here involved*. A policy reasonable in every respect and so long observed and followed by the Department of the Interior is entitled to liberal construction and consideration, and it will not be lightly overthrown by the courts. *United States v. Union Pac. Ry. Co.*, 148 U.S. 562, 572, 13 S.Ct. 724, 37 L.ED. 560; *Hawley v. Diller*, 178 U.S. 476, 488, 20 S.Ct. 986, 44 L.ED. 1157. (*Id.*, pp. 230-231). (emphasis added).

Concerning state and federal jurisdiction under the Act, it was said:

It will be observed that while the broad policy here established constitutes a present grant of rights of way through public lands and reservations to canal or ditch companies and individuals for the construction of irrigation works, *the jurisdiction conferred is dependent upon a cooperative jurisdiction to be exercised by the states. The states control the water and distribution thereof within their respective jurisdictions*, and the ditch company, to operate under the authority conferred by the general government, must first secure from the state a water right sufficient to furnish water for successfully carrying out the proposed project. The appropriator must then secure from the Secretary of the Interior an approval of its right of way for the construction of the ditch or ditches. (*Id.*, p, 231). (emphasis added).

Congressional construction of § 18 of the 1891 Act is fully in accord with the regulations of the Secretary of Interior and judicial construction of the Act. Congress had occasion to debate the 1891 Act in 1897, in consideration of H.R. 1948, 54th Cong., 2nd Sess. (1897), which was enacted into law as the Act of February 26, 1897, 29 Stat. 599, codified as 43 U.S.C. § 664, and repealed by the Federal Land Policy and Management Act of 1976, § 706(a) 90 Stat. 2793. The Secretary of Interior had ruled that the 1891 Act did not apply to reservoir sites reserved under the 1888 and 1890 Acts, *supra*. (29 Cong. Rec. 1846, 1948 (1897)). Congress acted to correct this ruling by providing:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all

reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way act of March third, eighteen hundred and ninety-one. Any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: Provided, that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

In these debates, the former Chairman of the House Committee on Public Lands, Congressman McRae of Arkansas, and Congressman Lacey, then Chairman, discussed the effect of the 1891 Act, and the history of events from 1888 to 1890. (29 Cong. Rec. 1948, 1955 (1897)). Based upon the following understanding of the 1891 Act, Congress extended it to the reservoir sites:

In 1891 another law was passed, by which it was provided that all public reservations might be made use of by corporations, individuals, or associations for the purpose of constructing reservoirs and irrigating ditches. (29 Cong. Rec. 1846 (1897)). (remarks of Rep. Catchings).

In 1891 it was further provided, in the right-of-way act for canals and reservoirs, that the waters of the arid regions might be utilized for the purpose of improving and cultivating

that country. (29 Cong. Rec. 1948 (1897)). (remarks of Rep. Lacey).

A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them. (Id.) (emphasis added).

Remember, the United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States. (Id., p. 1949). (emphasis added).

In view of the language used in the right of way act of March 3, 1891, . . . the control of the States is expressly preserved. (Id. p. 1952). (emphasis added).

MR. COX: Well, if they do utilize these reservoirs, the water will be under the control of Congress as to the charges that shall be made.

MR. LACEY: No, the water does not belong to the Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois (Mr. Cannon) relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to

regulate and control the management and the price of the water. I ask the Chair to submit the question on the amendment. (Id.)¹⁷

MR. SHAFROTH: The amendment which has been proposed by the gentlemen from Illinois (Mr. Cannon), and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters. (Id.)

In the first instance, any person wishing to use these reservoirs under the right-of-way act must obtain from the State authority to impound the water of the streams from which it is proposed to bring these waters from irrigation. And under the constitution and laws of every State and Territory in the arid region the waters thus diverted for purposes of irrigation are absolutely under the control of the State. (29 Cong. Rec. 1954 (1897)). (remarks of Rep. Mondell).

. . . the general purpose of the bill is right and in line with the established policy adopted by Congress as to the right of way for canals and ditches through arid lands, and we must improve it by some kind of rational legislation for the location of necessary canals and ditches. We cannot expect these reservoir sites to remain dry and never to be used for

¹⁷ The amendment referred to was proposed by Rep. Cannon, relating to state control of charges for water from reservoir sites.

irrigating lands that are worthless without water; and since the Government does not intend to go into a general scheme of irrigation that would bankrupt the Government, it becomes necessary under proper legislation to authorize States and individuals to utilize the sites for the public good. (29 Cong. Rec. 1955 (1897)). (remarks of Rep. McRae).

In this discussion, Congressman Lacey and Shafroth made express reference to the rules and regulations promulgated under the 1891 Act and their interpretation by the Interior Department. Within a few months the Organic Administration Act of 1897 was passed. It too made reference to the rules and regulations promulgated under "the laws of the United States," providing in part:

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. (16 U.S.C. §481).

The only rules and regulations relating to the use of waters on forest reservations with which Congress was familiar in 1897 were those promulgated under the right of way provisions of the Act of March 3, 1891, which the Secretary of the Interior had construed to facilitate "(t)he control of the flow and use of the water... (as) a matter exclusively under State or Territorial Control..." (18 Interior Dept. Decisions 168 (1894)).¹⁸

¹⁸ The United States reads §481 as "evin(ing) a congressional intention not to leave the disposition of national forest waters entirely to state law." (Brief for the United States, p. 63, fn. 25). Such a reading blatantly ignores contemporaneous understanding. The United States' reliance on *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S.

Shortly after the enactment of the Organic Administration Act of 1897, rules and regulations governing the forests were promulgated by the Secretary of Interior:

7. It is further provided, that — ... All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder,

* * * * *

11. The right of way in and across forest reservations for irrigating canals, ditches, flumes and pipes, reservoirs, electric-power purposes, and for pipelines, will be subject to existing laws and regulations. (Department of Interior Circular of June 30, 1897, *Rules and Regulations Governing Forest Reserves Established Under §24 of the Act of March 3, 1891*, reprinted in H. Docs., 55th Cong., 2nd Sess., Vol. 12, 1897 Report of the Secretary of Interior, pp. cix. et. seq.). (emphasis added).

Regulations Nos. 8-10 relate to the matters addressed in the first two paragraphs of regulation No. 7, which immediately preceed the quoted water provision of Regulation No. 7. Accordingly, Regulation No. 11 is clearly interpretative of the water provision in Regulation No. 7. The Secretary of Interior thus read 16 U.S.C. §481 as referring to existing laws and regulations relating to rights of way within the forests, viz., the rules and regulations promulgated under §18 of the Act of March 3, 1891.

690, is also ill-founded. *Rio Grande* stands for the proposition that the government can exempt waters from appropriation under state law in order to protect navigability. As regards the non-navigable waters in national forests to which Representative Lacey referred, *supra*, "the water is under control of the states." (20 Cong. Rec. 1949).

The Secretary of Interior prior to the transfer of forest administration in 1905, continued using unchanged the regulations for rights-of-way originally promulgated under the 1891 Act. (1903 *Compilation*, *supra*, pp. 14-17; Regulations of September 28, 1905, 34 Interior Dept. Decisions 212, 236, (1905); and of June 6, 1908, 36 Interior Dept. Decisions 567 (1907). In the 1906 Report of the Forester to the Secretary of Agriculture, (H. Exec. Docs. 59th Cong., 2nd Sess., Vol. 21, Report of the Secretary of Agriculture, No. 6, p. 267 (1906)), Gifford Pinchot states that the Forest Service began charging in that year for use of water, based upon lengths of ditches, acreage flooded, and use of advantageous locations, but that:

The water itself is granted by the State, not the United States. (*Id.*, p. 273).

Finally, in the Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. § 522, 43 U.S.C. § 959, repealed by the Federal Land Policy and Management Act of 1976, § 706(a), 90 Stat. 2793, Congress provided for rights of way in national forests for water works of any sort, i.e., for "domestic, public or any other beneficial use. . . ." The act cured the situation that the original provision provided rights of way only for irrigation purposes while state control of waters was provided for any purpose. The difficulty was discussed in H. Rep. No. 1850, 56th Cong., 1st Sess. (1900):

The result of the above-stated conflict of statutes has produced the anomaly that while forest reserves are being set aside to preserve watersheds and increase the water supply, the same legislation has denied its use in and for the industries calculated to be benefitted thereby. This bill corrects this condition by extending the opportunities to use the waters to mining, electrical, domestic, public and other beneficial uses.

The last relevant statute is the Forest Right-of-Way Act of 1905, 33 Stat. 628, 16 U.S.C. § 524, now repealed by the Federal Land and Policy Management Act of 1976, § 706(a), 90 Stat. 2793. This Act confirms the Secretary of the Interior's requirement that a state law water right is required in order to obtain federal rights of way through forest reserves by providing that rights of way are subject to the rules and regulations of the Secretary of Interior and must comport with the water laws of the State or Territory wherein the forest reserve is located.

In response to this legislative history, the United States naively asserts that "(t)he statutory purpose of 'securing favorable conditions of water flows' is defeated if the national forest has no reserved right to maintain" minimum instream flows. (Brief for the United States, p. 37). The United States ignores the fact that the forest reserves were designed to provide water to private appropriators, both within and below the forest watersheds:

If the state law of prior appropriation allows upstream appropriators to withdraw the full contents of the stream, the United States . . . can only resort to eminent domain and buy the stream back. (*Id.*, p. 37).

The United States may have hit the nail on the head.

This history shows that in 1891 Congress provided that state law would control the allocation of waters within the national forests for private uses and that such uses could include reservoirs which would impound the flows of streams within the forests for use in irrigation. In 1894 the Secretary of the Interior concluded that state law controlled the flows of waters in the forests. Congress made reference to the Secretary's rules and regulations in passing the Organic Administration Act of 1897. Promptly thereafter, the Secretary of the Interior promulgated new regulations, making no changes in the regulations governing rights of way within the forests.

In two statutes after the 1897 Act Congress provided for broadened beneficial use of the waters of the forests by expanding the grants of right of way to accommodate use of water for any beneficial use. These acts authorized the use of works for diversion or impoundment of waters without restricting or limiting the effects of such diversions or impoundments upon downstream flows.¹⁹ Based upon these laws substantial water rights vested under state law have been established by means of diversion within national forests that utilize entire stream flows. (cf., the *amici curiae* briefs of Twin Lakes Reservoir and Canal Company, the Southwestern Colorado Water Conservancy District, Phelps-Dodge, Inc., and Molycorp, Inc.). Such substantial diversions also include the municipal water works of many western towns and cities. See, e.g., the Act of June 6, 1900, 31 Stat. 657; Act of May 28, 1940, 54 Stat. 224, 16 U.S.C. § 552 (a).

The reservation doctrine is based upon the legal fiction — not in a pejorative sense — that Congress implicitly reserved sufficient waters to satisfy the purposes for which lands are withdrawn from the public domain. Congressional intent is

19. The 1901 Act, 31 Stat. 790, allowed rights of way for "canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public or any other beneficial uses. . . ." The 1905 Act allowed rights of way for "... dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals . . ." within the forests. Dams, reservoirs, and water plants are inconsistent with retained water rights for minimum in-stream flows because the physical works often involve the capture of all stream flows. The right of way Act of 1901 also allowed electrical plants, poles, etc., establishing the waters of the forest could be used for power generation. Under the technology of the day, the pressure head for power generation was achieved without damage to the plants by diverting the entire flow of streams into pipelines which utilized the falling levels of the mountain slopes. That mining uses would result in complete diversion of a stream's flows was recognized in *Jennison v. Kirk*, 98 U.S. (8 Otto) 453 (1878).

inferred. The United States asks the Court to infer an intent that flies in the face of congressional action. To adopt the position urged by the United States we must believe that the implicit expressions of Congress undermine its explicit ones.²⁰

POINT V

RECREATION AND GRAZING WERE NOT AMONG THE AUTHORIZED PURPOSES FOR WHICH THE GILA NATIONAL FOREST LANDS WERE OR COULD HAVE BEEN WITHDRAWN FROM THE PUBLIC DOMAIN.

The essence of the United States' argument in support of its claims for reserved rights for recreation and stockwater uses is that people have historically used the forest lands for recreational purposes and cows have historically grazed there. From these two facts, however, the United States' conclusion does not follow.²¹

In discussing the "legislative and administrative background" the United States relies on selected passages from secondary sources and one inapposite statute:

20. When Congress sought to preserve water levels in streams within one national forest, it did so by statute, providing in 16 U.S.C. § 577b:

In order to preserve the shore lines, rapids, waterfalls, beaches, and other natural features of the region (parts of the Lake Superior National Forest) in an unmodified state of nature, no further alteration of the natural water level of any lake or stream . . . shall be authorized. . . .

21. The United States prefaces its argument by mocking the fact that a mistake was made in New Mexico's initial memorandum brief before the Special Master. (Brief for the United States, pp. 40-43). In argument before the district court, counsel for New Mexico openly requested leave to correct his mistake. The matters in question were thoroughly argued and briefed before the district court and the New Mexico Supreme Court.

The recreational purposes of the national forest were articulated throughout the period in which the national forests were first established. The 1890 Act creating the first forest reservations in California, specifically authorized the Secretary of the Interior to permit "the erection of buildings for the accommodation of visitors" and "the construction of roads and paths" through the forest. In addition, it instructed him to provide against the wanton destruction of the fish and game inside the forest, and against their taking "for purposes of merchandise or profit," and to protect all the "natural curiosities, or wonders within such reservation, * * * in their natural condition." 26 Stat. 651; see p. 32, *supra*. (Brief for the United States, p. 44).

The Act of October 1, 1890, to which the United States refers, created Yosemite National Park. In response to a question concerning the issuance of rights of way through the reserve, Justice VanDevanter, then an assistant attorney general, issued an opinion concluding that the water and rights of way provisions of the Acts of 1891 and 1897 had no application to the special legislation creating Yosemite National Park. (28 Interior Dept. Decisions 474 (1899). Yosemite was different.

As noted earlier, the Department of the Interior in 1893 and 1894 requested that similar language be inserted in the proposed forest legislation, including specific legislative instruction that the Secretary preserve "such wonders and curiosities and game as may be thereon" (H. Exec. Docs. 53rd Cong., 3rd Sess., Vol. 14, Report of the Secretary of the Interior, Vol. 1, pp. LXXIV-LXXV (1894)). The McRae bill

of 1896 contained such a provision. (28 Cong. Rec. 6410 (1896)). It was rejected.²²

The United States' explanation in support of reserved rights for grazing is equally disingenuous. The provision of the 1897 Act requiring that "(a)ll waters on such reservations may be used . . . under the laws of the State wherein such forest reservations are situated," is again ignored. So is the history. During the passage of the Range Revegetation Act, Act of October 11, 1949, 63 Stat. 762, at 95 Cong. Rec. 13566 1949, Congressman Barrett referred to H. Rep. No. 2456, 80th Cong., 2nd Sess. (1948), and stated that grazing was not among the recognized uses of the forests under the 1897 Act. The report stated:

Much of the present controversy . . . stems from the omission in the basic Forest Act of 1897 of reference to grazing as among the

22. The United States makes the same argument in its discussion of the legislative history of the 1897 Act, urging that "Congress provided for the systematic extension of the (natural wonder, game, and fish protection) concept of national forests that had begun with the 1890 legislation." (Brief for the United States, p. 32). The United States overlooks the pertinent history.

The rejection of the proposed language in the 1896 version of Secretarial powers of regulation of H.R. 119 should be contrasted to the purposes clause of the National Park Service Act of 1916, 39 Stat. 535, 16 U.S.C. §1(1970): the "fundamental purpose of said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." In H. Rep. No. 700, 65th Cong., 1st Sess. (1916), the Committee stated with respect to this law:

In the national forests there must always be kept in mind as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people.

Compare the different treatment afforded the United States' claims for its national parks in the Water Division No. 5 proceedings in Colorado, See App. B. p. 128b.

recognized uses of the national forests and does not prescribe any policies for the administration of grazing as a function of the Forest Service. The Forest Act only provides for timber and watershed conservation. Other presently recognized uses such as recreation and wildlife are also omitted. (Id., p. 10). (emphasis added).

The Committee recommended:

1. *That the Forest Act be amended to provide that grazing, recreation, and wildlife be made basic uses of national forest land. (Id., p. 15). (emphasis added).*

In the Act of 1897, the Congress provided:

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations . . . ; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. (16 U.S.C. §480).²³

Perhaps in tacit recognition of its untenable view of the legislative history of the Organic Administration Act of 1897, the United States has asserted, albeit inconsistently, that the reservation doctrine provides not only that amount of water

²³. This language immediately precedes the water provision of the 1897 Act, 16 U.S.C. §481. The two were combined in the Senate version of H.R. 119 passed in 1895. (27 Cong. Rec. 2780 (1895)).

implicitly necessary to satisfy the purposes for which the Gila National Forest lands were withdrawn from the public domain, but also provides whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees.²⁴ Reliance is placed on the authority the government derives from §478 of the Organic Administration Act to regulate "proper and lawful" uses of the forest lands.²⁵

That the United States' logic is in error can be seen by its analysis of the case law dealing with its authority to regulate such activities. For example, in its brief on the subject in

²⁴. The United States points out that hotels, stores, mills, summer residences, and similar establishments are allowed in our national forests. (Brief for the United States, p. 48). It is said that this reflects federal involvement in recreation and that Congress must have intended that sufficient water be reserved to permit these uses to continue. The United States appears to assume that if these waters are controlled by state law, the uses will not occur or that they may be impaired by other uses. Thus, the United States wishes to use the reserved rights doctrine to create a preferential class of in-forest uses for hotels, stores, mills, summer residences, ski resorts, and the like. It is not explained why all of the other "domestic, mining, milling, (and) irrigation" uses don't get the same treatment.

²⁵. From the mere fact that the Secretary could regulate a use of the forests and the fact that the use requires water, it cannot be inferred that a federal water right is necessary for the purposes of the reserve. Contemporary regulations of the Secretary of Interior establish, for example, that grazing was allowed *only* if it did not interfere with water supply or state water rights. Grazing of sheep and goats was allowed in certain reserves, and only if "... the water supply of the people will not be adversely affected by the presence of sheep and goats within the reserve." Grazing of other livestock was allowed only "... so long as it appears that injury is not being done the forest growth and water supply and the rights of others are not thereby jeopardized." (Circular of December 23, 1901, reprinted in 1903 *Compilation, supra*, p. 61). The fact that the Secretary regulated grazing shows the subjection of grazing use to protection of state water rights, not that waters were reserved from appropriation under state law to supply livestock needs. The regulations provided the livestock could not intrude upon reservoir water supply and that sheep and goats could not be allowed within 500 feet of any live spring or running stream. (*Id.*, 66, 70).

State of New Mexico, ex rel., S. E. Reynolds, State Engineer v. Molycorp, et. al., United States District Court for the District of New Mexico, Civil No. 9780, presently pending, the United States argued as follows:

The opinion in *McMichael v. United States of America, supra*, considered the very issue now before this court. In that case appellants argued that certain regulations establishing a wilderness area limiting the use of portions of a National Forest were not authorized under the Organic Administration Act of June 4, 1897. In upholding the regulation as a valid forest purpose the court stated:

The consistent administrative interpretation of the Act of June 4, 1897, however, has been that while recreational considerations alone will not support the establishment of a National Forest, *they are appropriate subjects for regulation.* Congress has tacitly shown its approval of this interpretation by appropriating the sums required for its effectuation. (Emphasis added) (355 F.2d at 285).²⁶

All the 9th Circuit was saying, of course, was that the Secretary of Agriculture has the authority under §478 of the Act to make rules and regulations governing the use of wilderness. The court did not conclude, as the United States does, that "the regulation is a valid forest purpose" out of which reservation water rights can arise in behalf of the forest

26. It should be noted that the conclusions of Special Master in federal district court are essentially the same as those of the New Mexico state courts in the case at bar.

administrators. This conclusion, we submit, is patently erroneous.

Section 551 of the Organic Administration Act reads as follows:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. (16 U.S.C. § 551 (1975)).

According to the United States, "(o)bviously, 'occupancy and use' contemplate more than the two purposes identified by (New Mexico)." (Brief-in-Chief before the New Mexico Supreme Court, p. 13). "Obviously," of course, is legalese for the probability that the assertion it qualifies may not be correct, and such is the case here. From the fact that the Secretary of Agriculture is empowered to regulate the many *uses* of forest lands it does not follow that the *purposes* for which national forest lands can be reserved are somehow expanded. On the contrary, it was to preserve the objects or purposes of the forests as they were enumerated in §475 that the Secretary was authorized to regulate occupancy and use.

It will be recalled that the major deficiency of the Creative Act of 1891 was its failure to provide for the regulation of the forests once they were reserved, and it was largely for this reason that the Organic Administration Act of 1897 was passed. (Bassman, *The Organic Act of 1897: A Historical Perspective*,

supra; "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," *supra*). Section 551 was intended to remedy this deficiency. In order to insure that the purposes of watershed protection and timber preservation were not undermined or interfered with by the unrelated, but lawful activities in the forests, those activities had to be regulated: "... any person (may enter) upon such national forests for all proper and lawful purposes (provided that such persons) must comply with the rules and regulations" adopted under § 551. (16 U.S.C. § 478). Accordingly, § 551 was designed to regulate forest uses, and not to somehow equate forest uses with forest purposes. If we can draw any conclusion from the fact that § 551 was included in the Act, it is that Congress was aware that many of the uses made of forest lands by private individuals might be inconsistent with the purposes for which the forests were created.

The cases which have dealt with 16 U.S.C. § 551 support this conclusion. For example, in *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land. The Court first noted the purposes for which the forests were created:

From the various acts relating to the establishment and management of forest reservations, it appears that they were intended to improve and protect the forest and to secure favorable conditions of water flows.

The Court then noted the regulatory power provided to the Secretary by § 551 and went on to say:

Under these acts, therefore, any use of the

reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at the season of the year, might not be so at another. (emphasis added)

In this light it is apparent that the United States' argument is in error. *Grimaud*, in the government's analysis, stands for the proposition that "the use of the national forests for grazing was determined to be a lawful purpose pursuant to the terms of the Organic Act." (Brief-in-Chief before the New Mexico Supreme Court, p. 27). It is clear, however, that § 551 exists to regulate forest uses "inconsistent" with forest purposes. (See also, *Light v. United States*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Hunt*, 19 F.2d 634 (9th Cir. 1927); *United States v. Johnston*, 38 F. Supp. 4 (D.W. Va. 1941) and *United States v. Shannon*, 151 Fed. 863 (D. Mont. 1907); *United States v. Hymans*, 463 F.2d 615 (10th Cir. 1972); *McMichael v. United States*, 335 F.2d 283 (9th Cir. 1965); *United States v. Reeves*, 39 F. Supp. 580 (W.D. Ark. 1941)).

Instead of supporting the contentions of the United States, the cases clearly indicate that §§ 478 and 551 in no way expand the purposes for which forest lands can be withdrawn under § 475. The Secretary may regulate skinny-dipping in the forests if it would preserve the interest of the public. *United*

States v. Hymans, supra. This does not compel the conclusion that every such regulated use or activity rises to the level of a forest purpose. The purposes for which national forest lands can be withdrawn are limited to those expressed in the Organic Act.

The argument that the United States has reserved water rights based upon the regulatory authority of the Secretary in § 551 also ignores the provision § 481 that "(a)ll waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated." If the power to regulate had entailed a power to reserve waters for the regulated uses, the Secretary would have been mistaken in his repeated expressions between 1894 and 1908 that only the states had the authority to regulate the flow and use of water. Congress would have been wrong, as well.

The United States confuses land use regulation with water use regulation. In the Acts of 1891, 1897, 1901, and 1905, the Secretary was given regulatory control over the siting and location of water diversion works in order to prevent interference with governmental occupation of the reserves. At the same time Congress expressly provided that the states should control the water. To now infer an unspoken and dormant intent that Congress did otherwise would be less than scholarly.²⁷

²⁷. The United States believes that the holding of the New Mexico Supreme Court would preclude "the United States from freely transfer(ing) stockwatering rights; rather, on any transfer of grazing rights, the new permittee would be forced to establish his own right." (Brief for the United States, p. 43). It is also urged that the "ruling that the Forest Service permittees must acquire their own rights to the use of forest water for stockwatering purposes would impede federal range management on the national forests." (*Id.*, p. 62). Both views are incorrect. The district court concluded:

That with respect to the above-listed uses in the Gila National Forest where the facts will show that the uses have been made by permittees of the United States Forest Service, the water rights arising therefrom

POINT VI

THE MULTIPLE-USE SUSTAINED YIELD ACT OF JUNE 12, 1960, DID NOT REWRITE HISTORY.

The Multiple-Use Sustained Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528 *et. seq.*, provides in pertinent part:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in (the Organic Act of 1897). (§ 528).

The United States argues that by this provision "Congress gave explicit recognition to the traditional use of national forests for outdoor recreation and other secondary purposes." (Brief for the United States, p. 53). In the Water Division No. 5 proceedings in Colorado the United States asserted that the Act was a "reaffirmation and codification" of the administrative policy of the Secretary of Agriculture. Before the Idaho Supreme Court it was contended that the Act "ratified" the

should be adjudicated to the permittee under the law of prior appropriation and not to the United States. (Conclusion No. 9, A. 230, emphasis added).

The court's conclusion was fashioned the way it is because the United States did not discriminate between federal uses and private uses in its water rights inventory, which became the basis of the list to which the court referred. Under New Mexico law *no water rights arise* for the kind of stock watering or grazing listed. Consequently there is nothing to adjudicate. No "transfers" are needed, and no burden is created. The principle remains, however, that the United States does not enjoy federal reserved rights for private uses.

additional purposes of recreation, aesthetics, and fish and wildlife preservation. (See App. B, p. 99b). According to the United States the Act legitimizes its claims.

As noted by the New Mexico Supreme Court, a similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975):

In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

"The purposes of this Act are declared to supplemental to, but not in derogation of, the purpose for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. §475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to

the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

....

(F)rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent (sic) to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service. . . . (522 F.2d at 953-54).

Congress shared this view. Pursuant to H.R. Res. No. 93, 80th Cong., 1st Sess. (1947), the House Committee on Public Lands and the Subcommittee on Forest Service Policy and Public Lands conducted extensive hearings. The Committee said:

The basic purpose underlying the creation of our national forests was the protection of our timber resources and watersheds. (H. Rep. No. 2456, 80th Cong., 2nd Sess., p. 10 (1948)).

Congress had not changed its mind in 1960:

The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of

timber as set out in the cited provision of the act of June 4, 1897. *Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest (under the 1960 Act) if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act. H. Rep. No. 1551, 86th Cong., 2nd Sess., p. 4 (1960). (emphasis added).*

There is nothing wrong with the management of national forests under the principle of multiple use. But in 1960 Congress did not change what it did in 1897.

CONCLUSION

We should respond to the impression created by the United States that the national forests will be jeopardized if its claims are not recognized. Implied throughout is the notion that the state wishes to deny water to the forests. This is inaccurate and misleading. It suggests that the state has little regard for the preservation of the forests within its borders.

Common sense should prove that this is not true. So should the fact that the Gila National Forest and others within the boundaries of the state continue to exist — very much alive, serene and beautiful.

If the judgment of the New Mexico Supreme Court — recently joined by the judgment of the Idaho Supreme Court — is upheld, the adjudication of the United States' claims will

continue as a matter of course. Pursuant to the decision of the New Mexico Supreme Court the Gila National Forest can continue to be improved and protected.

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

1. Act of July 26, 1866, Ch. 262 § 9, 14 Stat. 253, 43 U.S.C. § 661:¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States . . .

. . . . Sec. 9. And be it further enacted, That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same

1. The text of both the 1866 and 1870 Acts was amended by The Federal Land Policy and Management Act of 1976, P.L. 94-579 § 706(a), 90 Stat. 2793, to omit the provisions of the two laws respecting rights of way. The provisions of the two laws respecting water rights were retained, in accordance with § 701(g) (1) and (2), which provide at 90 Stat. 2786, 43 U.S.C. 1701:

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or —

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

2. Act of July 9, 1870, Ch. 235 § 17, 16 Stat. 218, 30 U.S.C. § 52:¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act. . . .

. . . Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. . . .

3. Desert Lands Act of 1877, Ch. 107 § 1, 19 Stat. 377, 43 U.S.C. § 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . . that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all,

lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

4. Act of September 2, 1888, 25 Stat. 526, 43 U.S.C. § 662 as amended, the Sundry Civil Appropriations Act for 1889, contained the following provision in the appropriation provisions for the United States Geological Survey:²

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employes in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars, or so much thereof as may be necessary. And the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a report to Congress, on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs,

² These provisions of the Act of September 2, 1888, and of 43 U.S.C. § 662 were repealed by § 704(a) of the Federal Land Policy Management Act of 1976, 90 Stat. 2792.

ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject, after the passage of this act, to entry, settlement or occupation until further provided by law: *Provided*, That the President may at any time, in his discretion, by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

4. This provision was amended by the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 662, the Sundry Civil Appropriations Act for 1891, as follows:²

For topographic surveys in various portions of the United States, \$325,000, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October 2, 1888, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1889, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or

settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

5. Act of March 3, 1891, Ch. 562 §§ 17, 18-21, 24, 26 Stat. 1095.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs: excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs. . . . [This language appears as 43 U.S.C. § 663.]

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof: also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such

reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of

this act from the date of their filing, as though filed under it: *Provided*, That is any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch. [These provisions as amended are codified as 43 U.S.C. 946-949.]³

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. [This section is codified as amended as 16 U.S.C. §471, termed the Creative Act.]⁴

6. The Organic Administration Act of June 4, 1897, Ch. 251, 30 Stat. 34-36:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, for

3. Sections 18-21 of the Act of March 3, 1891, as amended, were repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793.

4. This section was repealed by the Federal Land Policy and Management Act of 1976, §704(a), 90 Stat. 2792.

the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, namely:

* * * *

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: *Provided*, That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: (16 U.S.C. §473) *Provided*, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may

hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. [16 U.S.C. §475.]

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States. [16 U.S.C. §551].

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each

purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises. [16 U.S.C. §476.]⁵

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers,

5. This section was repealed by the National Forest Management Act of 1976, Act of October 22, 1976, 90 Stat. 2949, 2958.

miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located. [16 U.S.C. §477.]

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations. [16 U.S.C. §478.]

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (Not codified.)⁶

6. The Forest land in-lieu selection provisions of the 1897 Act were amended and repealed within the first decade of the 20th century.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church. [16 U.S.C. §479.]

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. [16 U.S.C. §480.]

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. [16 U.S.C. §481.]

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations

applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. [16 U.S.C. §482.]

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve. [16 U.S.C. §473.]

7. Act of February 15, 1901, Ch. 372, 31 Stat. 790, 16 U.S.C. 522, 43 U.S.C. 959;⁷

Be it enacted by the Senate and House of Representatives of the States of America in Congress assembled, That the Secretary Interior be, and hereby is, authorized and empowered, under regulations to be fixed by him, to permit the use of rights through the public lands, forest and other reservations of the States, and the Yosemite, Sequoia, and General Grant national [parks of, sic] California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any

⁷ This provision was repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793.

citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

8. Act of February 1, 1905, Ch. 288 §4, 33 Stat. 628, 16 U.S.C. §524:⁸

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

⁸. This provision was repealed by the Federal Land Policy and Management Act of 1976, §706(a), 90 Stat. 2793.

9. Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. §528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various

renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."

IN AND FOR THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,))))	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 4 W-425 through W-438
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,))))	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 W-467 and W-469
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA,))))	IN THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 6 W-85 and W-86
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 36, IRRIGATION DIVISION NO. 5,))))))	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF SUMMIT CIVIL ACTION 2371
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37, IRRIGATION DIVISION NO. 5,))))))	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE CIVIL ACTION 1529
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 51, IRRIGATION DIVISION NO. 5,))))))	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF GRAND CIVIL ACTION 1768
IN THE MATTER OF THE ADJUDICATION OF PRIORITIES TO THE RIGHT TO THE USE OF WATER FOR ALL BENEFICIAL PURPOSES IN WATER DISTRICT NO. 52, IRRIGATION DIVISION NO. 5,))))))	IN THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE CIVIL ACTION 1548

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V. MEMORANDUM OPINION CONCERNING RESERVED RIGHTS.

The Master-Referee believes that the submission of naked findings of fact and conclusions of law would fail to do justice to the resolution of the important, novel, and complex issues involved in this litigation. While simply making such findings and conclusions would indeed resolve the issues presented, it would do little to explain the rationale of the Master-Referee's determinations and perhaps even less to aid those Courts which may be called upon to review these proceedings. Consequently, the Master-Referee precedes his findings of fact, conclusions of law, and proposed decree with the following memorandum opinion on the reserved right claims of the United States.

A. Definition of the Term "Reserved Rights."

Prior to beginning any discussion of the concept of federal "reserved rights," it is essential to define or describe the term. Since the term represents a concept which has been developed solely by judicial decision, it is necessary to examine the case law regarding reserved rights to develop an adequate definition.

1. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899).

The case most frequently cited as the basis of the reserved right doctrine is *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899). In that case, the United States was seeking to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico and thereby appropriating waters for irrigation and other pur-

poses. In discussing whether a state is empowered to change the common-law riparian system of water rights and permit the adoption of the appropriative system, the Court said:

"Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be reconized: *First, that, in the absence of specific authority from congress, a state cannot, by it legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.*" (emphasis added)

That the United States possessed rights to the continued flow of water on its land was thus established.

2. *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908).

The actual form of this right of continued flow, at least as it applies to federal reservations, was elucidated in *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908), the first case to address directly the issue of reserved rights. The reservation in question in *Winters* was a Montana Indian reservation which was established in 1888. In 1889 and without complying with Montana law, the United States diverted 1,000 miners' inches of water from a stream bordering the reservation for use on the reservation. When later appropriations impaired the government's diversion, the United States sued to restrain them. The Supreme Court upheld the restrain-

ing order on the theory that the United States had intended in 1888 to reserve not only land but also water, the use of which could not be impaired by the subsequently-appropriating defendants. The Court said:

"The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 702, 43 L. 3d. 1141, 19 Sup. Ct. Rep. 770; *United States v. Winens*, 198 U.S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The Court found that without such a reservation of waters the purpose of the reservation, the transformation of the Indians from a nomadic to a pastoral people, could not be achieved. The United States was thus awarded 1,000 miners' inches in this first case dealing directly with the reserved right doctrine.

3. *United States v. Powers*, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939).

The doctrine of federal reserved rights appurtenant to Indian reservations was reaffirmed by the Supreme Court in 1939 in *United States v. Powers*, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939), and by numerous lower federal court decisions as well. *United States v. Ahtanum Irr. Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. den.*, 352 U.S. 988 (1957); *United States v. Walker River Irr. Dist.*, 104 F. 2d 334 (9th Cir. 1939); *United States v. McIntire*, 101 F. 2d 650 (9th Cir. 1939); *United States v. Hibner*, 27

F. 2d 909 (D.C. Ida. 1928); and *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D.C. Mont. 1968). See also, *United States v. Cappaert*, 508 F. 2d 313 (9th Cir. 1974), *aff'd*, U.S. (June 7, 1976) (44 R.W. 4756), regarding reserved rights in national monuments.

4. *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963);
Arizona v. California, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

The next United States Supreme Court case to address the reserved rights issue was *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963). It was by that decision that the Supreme Court first clearly expanded the doctrine of reserved rights to include non-Indian federal withdrawals and reservations while also reaffirming the doctrine's applicability to Indian reservations. Regarding reserved rights claimed on behalf of the five Indian reservations in question, the Supreme Court upheld the findings of the Master that:

1. The United States had, as a matter of fact and law, intended to reserve waters as well as lands;
2. The United States had reserved an amount of water sufficient to irrigate all the practicably irrigable acreage on the reservation. The Court specifically approved the rationale of *Winters* in finding that water was necessary to the establishment of "civilized communities" on the reservation — the main objective of the reservation system.

After upholding the Master's conclusions regarding Indian reservations, the Supreme Court went on to support

his extension of the reservation doctrine to other classes of federal reservations. The Court stated:

"The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."

The amount of water available to each of these non-Indian reservations was more specifically established in the decree of the Court wherein each of the reservations was awarded a sufficient quantity of water as was reasonably necessary to fulfill its purposes. *Arizona v. California*, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

5. *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971); *United States v. District Court in and for Water Division No. 5, Colorado*, 401 U.S. 527, 91 Sup. Ct. 1003, 28 L. Ed. 2d 284 (1971).

The next occasion for a discussion of the reserved right doctrine was the Court's decisions in the companion opinions of *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971), and *United States v. District Court in*

and for Water Division No. 5, Colorado, 401 U.S. 527, 91 Sup. Ct. 1003, 28 L. Ed. 2d 284 (1971) [hereinafter *Eagle County* cases], which were handed down in an earlier stage of this litigation. Both opinions involved the United States' claims for reserved water rights on the various non-Indian federal reservations in the State of Colorado which are at issue here. The decisions, however, focused on the question of the *jurisdiction* of the state courts of Colorado to adjudicate the reserved rights of the United States rather than on the merits of its claims as must be done in this litigation. As is evident from the very existence of this partial report, the Supreme Court found that, under 43 U.S.C. §666, the McCarran Amendment, the Colorado courts did have the jurisdiction to adjudicate the government's claims.

Despite the procedural focus of the two opinions, the Supreme Court did make several statements more helpful to a better understanding of non-Indian reserved rights than is provided by *Arizona v. California* alone. Regarding the power of the United States to reserve waters, the Court in *Eagle County* noted:

"It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.*, at 597, 83 S. Ct. at 1496. The federally reserved lands include any federal enclave."

As in the case of reserved rights on Indian reservations, the Court indicated that waters may be reserved to achieve the objectives of a non-Indian reservation: "The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave."

Both of these statements appear to be entirely consistent with the reserved right doctrine as developed by the Court in the Indian land cases and as more specifically defined in the decree in *Arizona v. California*, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964).

6. *Cappaert v. United States*, _____ U.S. _____, (June 7, 1976) (44 L.W. 4756).

The most recent statement of the Supreme Court regarding the reservation doctrine was delivered on June 7, 1976, in *Cappaert v. United States*, _____ U.S. _____, (June 7, 1976) (44 L. W. 4756). The decision dealt with the reserved rights of the United States appurtenant to the Devil's Hole National Monument. The Cappaerts were the owners of a large ranch bordering the Monument. In the operation of the ranch, the Cappaerts, subsequent to the establishment of the Monument in 1952, began withdrawals of underground water for use on their ranch. As a result of the Cappaert's withdrawals, the level of the water in the Devil's Hole National Monument began to drop below that level necessary to insure the survival of the Devil's Hole pupfish, a species found only in Devil's Hole and which the Monument had been created to protect. The United States successfully sought to enjoin the diversions by the Cappaerts to the extent necessary to maintain the pupfish. The Supreme Court affirmed the grant of that injunction.

The Court clearly reaffirmed the reserved right doctrine

and assured its applicability to all forms of federal reservations when it stated:

"This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, §8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, §3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams."

The Court noted that water will be considered reserved only when the United States intended to do so, and that such intent may be implied if previously unappropriated waters are necessary to accomplish the purposes of the reservation. Indeed, the Court found that, in *Cappaert*, the reservation was express. The Court did caution, however, that only such waters as are necessary to fulfill the purposes of a particular reservation could be reserved. In *Cappaert*, it was found that water sufficient to assure survival of the pupfish had been reserved when the Monu-

ment was created in 1952. Therefore, it upheld the enjoinder of the Cappaerts' diversions, but only to the extent necessary to maintain the level of water required for pupfish survival.

7. Priority of Reserved Right Determined through Comparison of Reservation Date with Appropriation Dates of Competing Uses.

It is important to understand that in Colorado there is a great difference between a date of appropriation and a water right's priority or priority date. The appropriation date is the day that the appropriation was begun, regardless of when some court eventually issues a decree granting a priority to that appropriation (water right). The priority or priority date, on the other hand, is the *later* of two dates: the date of appropriation or, under present law, the year in which the application for a decree was filed with the water court (or, under prior law, the junior-most priority date awarded in previous adjudications). For example, this means that a water right having an appropriation date of 1879, but actually receiving no decree until 1976, will be senior to every reserved right involved in this litigation. On the other hand, a water right having an appropriation date of 1910 and receiving a decree in 1911, will be junior to the vast majority of reserved rights in this litigation.

With the exception of the last few lines of §37-92-306, C.R.S. 1973, the present Colorado statute does not carefully preserve the distinction between "appropriation" and "priority" dates. Unlike the practicing water bar and the few lines cited above, the statutes seem to use the term "priority date" synonymously with "appropriation date," §37-92-305(1), C.R.S. 1973. Since the two

cited statutory sections are in conflict over the terms' meanings, the Master-Referee has chosen to preserve the distinction which he and the practicing bar have maintained. It does appear, however, that the statute uses the word "priority," as opposed to "priority date," to describe relative seniority of water rights. §37-92-103(10), C.R.S. 1973. Consequently, where the term "priority date" appears in other portions of this report, the word "priority" may be substituted by the reader for his or her administrative or judicial convenience.

**8. Reserved Right Is a Right to Use,
and Not the Title to, Water.**

A review of the court decisions which discuss reserved rights discloses language which seems to indicate that the United States reserved the *ownership* of enough water to fulfill the purposes of various land reservations. For example, in *Winters*, 207 U.S. at 577, the Court states that "[t]he power of the Government to reserve *the waters* and exempt them from appropriation under the state laws is not denied, and could not be." (emphasis added) Such early references to reserved rights in terms of ownership of the water is not surprising; the concept is based upon federal ownership public lands under Article IV of the federal Constitution. At one time, of course, the United States owned nearly all of the lands of Colorado and the waters appurtenant thereto.

Colorado, and most other dry western states, subsequently established a system of appropriation for the allocation of water resources within the state. A water right in Colorado, as in all other appropriation states, is simply the right to *use* (not the ownership of) water under

certain conditions. Under Colorado's priority system, those conditions are fairly clearcut: one may use a specific quantity of available water if he has the necessary priority to do so. If another user has a more senior priority, the junior user must wait until the senior user's right to use the water has been fully satisfied. *Colorado River Water Conser. Dist. v. United States*, _____ U.S. _____, 96 Sup. Ct. 1236, _____ L. Ed. 2d _____ (1976); Colorado Constitution, Art. XVI, section 6; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1883).

Accordingly, this Court has no jurisdiction other than to assign priorities to specific uses of water, a process known as adjudication of water rights. See §37-92-301 *et seq.*, C.R.S. 1973. Consequently, it has no power to recognize the title of any claimant to any corpus of water. *Crippen v. White*, 28 Colo. 298, 64 P. 184 (1901).

As a result this Court has jurisdiction only to recognize the validity of the federal claims to reserved rights and to assign priorities to those rights. This means that a reserved right in Colorado is simply the right of the United States to use certain amounts of water for specific purposes. This means that, if the United States should elect not to use the water, a user with a more junior priority would be free to use the same water for his own purposes.

The more recent federal Supreme Court opinions recognize that a reserved right in an appropriation state can be nothing more than a right to the use of water. *Arizona v. California*, 373 U.S. at 595: "In these proceedings, the United States has asserted claims to waters . . . for use on Indian Reservations." And at 596:

"The Master found both as a matter of fact

and law that when the United States created these reservations . . . it reserved . . . *the use* of enough water to irrigate the irrigable portions of the reserved lands." (emphasis added)

The Court later agrees with this finding of the Master. In the *Eagle County* cases, 401 U.S. at 524, the Court said, "we deal with an all-inclusive statute concerning the adjudication of rights to the use of waters of a river system," and in *Colorado River Water Cons. Dist.*, 96 Sup. Ct. at 1240, the Court repeatedly refers to reserved rights as federal "water rights," while describing water rights under Colorado law as a right to the use of water.

9. Conclusion.

The above cases and discussion of Colorado law permit the extrapolation of a workable, if broadly based, definition of the federal reserved right doctrine. It can be authoritatively stated that:

1. The United States has the power to reserve certain unappropriated waters appurtenant to any federal reservation or withdrawal from the public domain.
2. Whether the United States actually intended to exercise that power by reserving water in any such instance is a matter of fact to be determined in connection with specific claims of the United States.
3. The intent of the United States to reserve water may be implied by the actions and circumstances surrounding a particular reservation.
4. Any such reserved right exists only to serve the purposes of the reservation and water may be

utilized only on the reservation to effectuate the purposes for which it was created.

5. The reserved right appurtenant to any federal reservation is for that quantity of water which is reasonably necessary to fulfill the purposes of the reservation.
6. Within an appropriation system, the date of priority of a particular reserved water right is the date of the reservation.
7. Any reserved right in Colorado is subject to water rights under Colorado law for which *appropriations* were initiated before the date of the reservation on which the reserved right is based.
8. A reserved right in Colorado is, as is any Colorado water right, the right to *use* water in priority when it is naturally or physically available. In other words, a reserved right is the legal basis for a priority to the use of a certain amount of water — it is not the title to any physical corpus of water.

These broadly stated extrapolations establish the parameters of the federal reserved rights doctrine. In large measure, the remainder of this opinion will be concerned with applying these basic elements to the reserved rights claimed in these matters.

B. The Existence of Reserved Rights in Colorado.

A major and important issue to be decided in these matters is whether reserved rights can exist at all in Colorado. Several objectors have argued that the United States has long since relinquished, as a matter of law and of fact, any

claims it may have once had to reserved water rights for lands in this state. The United States, of course, contends that it has never so relinquished its rights and that it has the power to reserve water in Colorado just as it does in any public domain state. These contentions present the initial issue which must be decided herein.

1. *Stockman v. Leddy*, 55 Colo. 24,
129 P. 220 (1912) - - **The Compact Argument.**

The objectors argue that the decision of the Colorado Supreme Court in *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912), and Article 16, sections 5 and 6, of the Colorado Constitution, prohibit, as a matter of law, the establishment of federal reserved water rights in Colorado. The Master-Referee does not agree.

a. *Rationale of the Objectors.*

Article 16, section 5 of the Colorado Constitution provides:

"Water of streams public property. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

Article 16, section 6 states in pertinent part:

"Diverting unappropriated water — priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. . . ."

The Constitution of Colorado contained both of these

provisions at the time it was prepared under the Congressional enabling legislation and submitted to the President prior to his proclamation admitting Colorado to statehood. Pres. Proc. of August 1, 1876. See, *United States v. District Court in and for County of Eagle*, 169 Colo. 555, 458 P. 2d 760 (1969), *aff'd* 401 U.S. 520 (1971).

In *Stockman v. Leddy*, *supra*, The Colorado Supreme Court discussed the effect of these provisions as they relate to the ownership of the waters of the state:

"From the very beginning of the settlement in Colorado territory, and in other arid regions of the West, irrigation has been recognized by federal and state legislation, by the decision of the federal and state courts, and by the people directly interested, as the declared public policy. These decisions need not be cited. They are abundant. In section 5 of article 16 of our state constitution as originally adopted, this public policy is thus tersely expressed: 'The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.' Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the constitution, and declares for all time the public policy of this state which

theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier session of our general assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use. The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. *The property right, however, in the natural streams, and waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use.*

This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the

topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, non-navigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. *When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity.* We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its

sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty." (emphasis supplied)

The objectors contend that *Stockman* establishes state ownership of all waters within the boundaries of the state. They contend that the United States has recognized and agreed to Colorado's ownership of the waters within its boundaries as described in *Stockman* and that there can therefore exist no reserved rights in Colorado post-dating its admission to the Union.

The importance of *Stockman* is underscored by the statement of the Colorado Supreme Court in *United States v. District Court in and for County of Eagle*:

"We do say at this time that, except for *Stockman v. Leddy*, *supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound."

The Master-Referee is of the opinion that *Stockman* does not prohibit the establishment of federal reserved rights in Colorado as a matter of law and that it therefore need not be overruled prior to consideration of the claims of the United States.

b. Discussion of Stockman v. Leddy.

Stockman v. Leddy was a mandamus action against the state auditor to compel him to issue a warrant to

Stockman for services rendered to a joint legislative committee. The state auditor defended his refusal by contending that the statute under which *Stockman* was making his claim was unconstitutional. To the Court, the determination of the statute's constitutionality was the principal purpose of the action.

The statute in question in *Stockman v. Leddy* provided for the creation of a joint legislative committee to:

"... investigate the acts and claims of the Interior Department, the Reclamation Service, and the Forest Service of the Federal Government, and to ascertain whether or not the right of this state to control the distribution of the waters thereof within its borders is thereby in any way unlawfully limited or interfered with or infringed upon, or about to be interfered with or infringed upon; to investigate and determine what claims are made by or upon behalf of any state or corporation or individual thereof to the waters of any stream or streams originating in or flowing in the state of Colorado to the detriment of the interests of this state and the citizens thereof or the appropriators and users of said waters; and to examine into all matters by which the state's right to control the waters thereof may be affected."

A sum of \$50,000.00 was appropriated to be used at the disposal of the committee. *Stockman's* claim for services rendered was to be paid from this appropriation.

After finding that the state auditor had standing to

challenge the constitutionality of the statute, the Court defined the issues for decision. They were stated as:

"First, may the general assembly, out of the public revenues, appropriate money for the purpose of protecting or defending its rights, or those of its citizens, in the waters of the natural streams of the state; and, second, can the appropriation in this act be upheld, or is it in contravention of our constitution, as an attempt by the general assembly to confer purely executive power on a body or committee composed entirely of its own members?"

It was in response to the first issue that the Court made the lengthy statement cited above. On the basis of that analysis, the Court answered the first issue affirmatively. State ownership of water was an interest which the legislature had a duty to protect.

In response to the second issue, the Court found the statute unconstitutional. The Court noted that the investigation of the legislative committee was not intended to be a basis for future legislative action. The Court agreed that the legislature could authorize such an investigation and appropriate necessary funds for it. What the Court found unconstitutional, however, was the fact the members of the legislature were called upon to execute the law. This, the Court said, was violative of Article III of the Colorado Constitution providing for the separation of governmental powers. On this basis alone the mandamus action was rejected.

c. Inapplicability of Stockman as Precedent in this Litigation.

After carefully reviewing *Stockman v. Leddy*, the Master-Referee concludes that the language relied upon by the objectors is mere dictum or, in the alternative, that the existence of reserved rights was not at issue in that opinion.

It is the opinion of the Master-Referee that the decision in *Stockman v. Leddy* is distinguishable from the litigation at hand and does not dispose of the issue of whether the United States may claim reserved rights in Colorado.

[1.] *The Stockman Language Regarding State Water Ownership Is Mere Dictum and Not Binding Herein.*

The lengthy discussion of state ownership of water rights which the *Stockman* court made in responding to the first issue of that case was purely dictum and of no value as precedent. Language which is not the basis of a decision is dictum and is in no sense authority on the proposition addressed by such language. *Wheeler v. Wilkins*, 98 Colo. 568, 58 P.2d 1223 [1936]; *Young v. People*, 54 Colo. 293, 130 P. 1011 [1913]. Discussions of questions not directly involved in an opinion must be considered to represent only the views of its author. *Twilley v. Durkee*, 72 Colo. 444, 211 P. 668 [1922].

The *Stockman* language cited above and by the objectors was not a basis of the decision therein and is therefore dictum and not binding on the Master-Referee in these matters. *Stockman* was a mandamus action in which the issue was the validity of a warrant. The court denied the request for mandamus on the sole basis that the warrant had been issued pursuant to an appropriation which violated Article III of the Constitution. The lengthy discussion outlining the state's ownership of the water within its boundaries was wholly extraneous to the

ultimate decision to deny mandamus relief. Indeed, the Court addressed the ownership question only in relation to its first issue. In doing so, it made a preliminary finding that the appropriation was in fact valid. In no way can that determination be labeled a basis of the Court's decision to deny mandamus relief due to the invalidity of the appropriation. To accept this dictum and to consider it as precedent in this litigation would be inappropriate since *Stockman* involved issues entirely alien to this litigation.

(2) *Reserved Rights Exist as an Exception to Complete State Water Ownership.*

Even if the *Stockman* language regarding ownership of water were not dictum, the language must be evaluated in light of the matters actually at issue in *Stockman* as contrasted with the issues in this litigation. The instant litigation squarely addresses the existence of reserved rights in Colorado. The *Stockman* decision did not concern reserved rights in any way and did not address their existence, even in dictum. In light of the many cases prior and subsequent to *Stockman* which have unqualifiedly upheld the right of the federal government to reserve waters, the Master-Referee is of the opinion that the only reasonable interpretation of *Stockman* is that reserved rights were not addressed by the Court and must necessarily exist as an implied exception to any rules which *Stockman* may have established. *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 [1908]; *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 [1963]; *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 [1971]; *Cappaert v. United States*, _____ U.S. _____, [June 7, 1976] [44 L.W. 4736]. Such an interpretation does no violence to the rationale of *Stockman*, as the state

of Colorado must still be considered to be the owner of all *unreserved* waters. If the interest of the state in protecting and regulating the waters within its boundaries derives from ownership thereof, as *Stockman* would indicate, its interest is in no way diminished by recognizing federal reserved rights since administration of those federal rights is a matter left to the state by the McCarran Amendment.

The Master-Referee believes that this interpretation of *Stockman* is the only one permissible in light of the decision of the United States Supreme Court in *United States v. District Court and for County of Eagle, Colorado*, *supra*. There the Court appeared to be addressing the comments of the Colorado Supreme Court regarding *Stockman* in its *Eagle County* opinion when it said:

"It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Federal government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.*, at 597, 83 S.Ct. at 1496. The federally reserved lands include any federal enclave." [emphasis supplied]

Whatever application *Stockman* may have had prior to this pronouncement of the United States Supreme Court, it must be limited accordingly. By simply excepting reserved waters from the ambit of the *Stockman* language, the above-cited language can be reconciled with subsequent decisions.

The Master-Referee notes that there is support for this

interpretation in analogous law. In *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 Sup. Ct. 832, 99 L. Ed 1215 [1955], the Supreme Court addressed the issue of the applicability of the Desert Land Act of 1877 and related Acts of 1866 and 1870 to federal reserved lands in California. In *California Oregon Power Co. V. Beaver Portland Cement Co.*, 295 U.S. 142, 55 Sup. Ct. 725, 79 L. Ed. 1356 [1935], those acts had been held to have severed all non-navigable waters from the public domain, leaving them open to public use *under the laws of the various states*. In the *Federal Power Commission* decision the Court limited that holding by excluding its applicability to federal reserved lands. In this case, the holding of *Stockman*, so far as it applies to bar assertion of the claims of the United States, must be similarly limited by excluding therefrom waters reserved by the federal government.

The inescapable conclusion reached by an analysis of *Stockman* and the many decisions of the United States Supreme Court is that *Stockman* presents no bar to the claims of the United States in these matters.

2. *The Equal-Footing Doctrine.*

A number of the objectors have adopted the position that the equal-footing doctrine prohibits the establishment of federal reserved water rights in Colorado to the extent they post-date its statehood. The Master-Referee is of the opinion that the doctrine cannot be so construed.

a. *Description of the Doctrine and Rationale of the Objectors.*

The Congress is empowered to admit new states to the Union by Article IV, §3 of the United States Constitution. As interpreted by the United States Supreme Court, this requires that new states be admitted on an "equal

footing" with the original thirteen states. *Skiriotes v. Florida*, 313 U.S. 69, 61 Sup. Ct. 924, 85 L. Ed. 1193 [1941]. This means that newly-admitted states must be equal to the original thirteen "in power, dignity, and authority" and "competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself." *Coyle v. Smith*, 221 U.S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853 [1911]; *Skiriotes v. Florida, supra*.

The objectors argue that, since the United States had no interest in the water of the original thirteen states, under the equal-footing doctrine it can have no interest in the waters within the state of Colorado. The objectors contend that each of the original states retained ownership of its waters upon admission to the Union and, hence, Colorado must also be deemed to own the waters within its boundaries. Since Colorado owns the waters within the state, the United States can therefore claim no reserved rights to water on federal lands in the state.

b. *Inapplicability of the Equal-Footing Doctrine.*

The arguments of the objectors based on the equal-footing doctrine closely parallel those based on *Stockman v. Leddy, supra*, in that they attempt to establish state ownership of waters within its boundaries. State ownership is said to preclude the establishment of reserved water rights post-dating the time of assumption of state ownership — August 1, 1876. The Master-Referee concludes that the doctrine cannot be so construed.

(1) *The Doctrine Does Not Apply In This Matter Where Proprietary Rights Are Involved.*

The equal-footing doctrine does not command that all states must enter the Union equal in economic stature and property rights to the original thirteen. As the Supreme

Court stated in *United States v. Texas*, 339 U.S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 [1950]:

"The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See *Stearns v. State of Minnesota*, 179 U.S. 223, 245, 21 S.Ct. 73, 81, 45 L.Ed. 162. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns v. State of Minnesota*, *supra*, 179 U.S. pages 243-245, 21 S.Ct. pages 80-81. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. *The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.*" [emphasis supplied]

See also *Coyle v. Smith*, *supra*. Thus, while the State of Colorado most certainly entered the Union on par with the original states as regards sovereignty, it cannot be argued that the United States was forced to transfer its ownership of the waters on all public lands to the state under the equal-footing doctrine. To do so expands the doctrine in a direction foreclosed by the clear statement of *United States v. Texas*, *supra*.

The Master-Referee, of course, recognizes that the

equal-footing doctrine can have a direct effect on certain property rights where the property right is so identified with a sovereign power of government that it cannot be separated therefrom. *United States v. Oregon*, 295 U.S. 1, 55 Sup. Ct. 610, 79 L. Ed. 1267 [1935]; *United States v. Texas*, *supra*. For example, this rule has generally been applied to uphold the transfer of ownership of the beds and shores of navigable streams from the United States to the states upon their admission to the Union. See *United States v. Texas*, *supra*, and cases cited therein. The Master-Referee is of the opinion, however, that the decision of the Supreme Court in *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 [1963] made it clear that this rule cannot be extended to prohibit the establishment of federal reserved rights after a state's admission. In this case, any property interest of the state to the ownership of waters within its boundaries is not so identified with its sovereign powers as to require invocation of the equal-footing doctrine.

(2) *Available Authority Establishes That Reserved Rights Exist as an Exception to State Water Ownership.*

Even if the equal-footing doctrine could be extended to apply on the facts of this case, however, it still cannot be interpreted to preclude the post-statehood establishment of federal reserved water rights in Colorado. Whether based on concepts of equal footing or the language of *Stockman v. Leddy*, the theory that state ownership of water precludes the establishment of federal reserved rights is unacceptable in light of *United States v. District Court in and for Eagle County, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 [1971]. At the risk of being repetitive, the Master-Referee again notes that the Supreme Court stated therein that the federal government had the authority "both before and after a state is admit-

ted into the union'' [emphasis supplied] to reserve waters appurtenant to federally-reserved lands. Indeed, in making this statement, the Court relied on *Arizona v. California, supra*, a case in which, as noted above, federal reserved rights were established after the admission of Arizona to the Union.

Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 [1908], also lends support to the conclusion that the equal-footing doctrine cannot be applied to bar the establishment of federal reserved rights. The Supreme Court rejected the argument that the equal-footing doctrine prohibited the existence of reserved rights in a state admitted under the doctrine. The case is not conclusive in this matter because the waters reserved in *Winters* were reserved prior to Montana's statehood. The Master-Referee believes, however, that the statements made therein are certainly persuasive, particularly in light of *Eagle County* and *Arizona v. California*.

The Master-referee concludes that the cited cases establish at the very least that reserved rights created after admission of a state to the Union under the equal-footing doctrine must exist as an exception to the state's otherwise complete ownership of the waters within its boundaries.

3. Filings by the United States Forest Service with the Colorado State Engineer.

Whether the United States has exercised its power to reserve waters on a particular reservation is a question of intent to be determined from the facts surrounding the reservation. The testimony and exhibits presented in this matter reveal that the United States Forest Service has at times filed maps and statements with the Colorado state engineer in addition to obtaining water right decrees from Colorado courts for the use of water on national forest lands. The objectors contend that the series of filings

made by the United States Forest Service indicate that the United States intended to acquire water rights on the national forest in accord with state law and did not intend to reserve waters thereon when the forests were established.

The testimony and exhibits, especially those presented by the City and County of Denver, do indeed demonstrate that the United States Forest Service made a number of filings with the state engineer and has obtained decrees for water right priorities under state law. Furthermore, it was apparently Forest Service policy to do so, as is indicated by several of the Forest Service manuals presented into evidence by various objectors. See Twin Lakes Reservoir and Canal Co. Ex. No. 10, 12, 13. This policy and the acts of administration thereunder continued until approximately 1965 when the Forest Service adopted a print-out system of compiling its water rights. Tr., Oct. 24, 1973, p. 102. The question for decision is whether these filings and/or applications and the stated Forest Service policy demonstrate a lack of intent by Congress to reserve water on the national forests in Colorado. The Master-Referee concludes that they do not.

A Forest Service policy to adhere to state water law in obtaining water uses does not necessarily imply a corresponding intent to relinquish any reserved rights to the use of water on forest lands. The evidence presented in this case demonstrates that this is so.

First, though the evidence indicates that the Forest Service did submit a number of filings and applications, it also indicates that it submitted only a minute proportion of its total known water uses. The testimony of the government's witness shows that of the 3,385 water uses on forest lands in Water Divisions No. 4, 5, and 6 known to Forest Service officials in 1969, only 312 had ever been submitted in the form of a map and statement to the state engineer, a total of 9.3 percent of the government's uses.

Tr., Oct. 24, 1973, p. 24. A far fewer number of rights, only 0.71 percent, were ever adjudicated in Colorado courts at the behest of the Forest Service. Tr., Oct. 24, 1973, p. 24. These percentages are reduced even more when computed against more recent and more complete compilations of Forest Service uses. Tr., Oct. 24, 1973, p. 25. In addition, a government witness testified that water is actively used on forest lands based squarely on the reserved rights of the United States. Tr., Dec. 12, 1972, pp. 68-124.

This evidence does not bear out the contention that the United States intended to utilize state water law in acquiring water uses on national forests. The extremely small number of filings made and decrees obtained by the government speaks for itself and shows that no organized effort was made to implement any apparent Forest Service policy to adhere to state law. Of greater significance is that for the vast majority of its uses the Forest Service has ignored state requirements and based its uses on the reserved right doctrine alone. As stated by government counsel in brief, it would be illogical to assume that the Forest Service would have filed on one-tenth of its water uses had it understood that such filings would result in the loss of the remaining nine-tenths.

Other evidence presented by the government clearly shows the reason behind the filings and application of the federal government. Rather than representing acquiescence to state law, the filings were intended to notify the state and other water users that a water use based on the reservation doctrine was being established on forest land. Tr., Dec. 12, 1973, pp. 148-49. This is illustrated by the fact that the United States ceased utilizing Colorado state law when it adopted its print-out compilation of water uses for advising the state and water users. Tr., Oct. 24, 1973, p. 102. Any filings were only in addition to the superior rights

of the United States. Tr., Oct. 24, 1973, p. 101. One must conclude that the compliance of the United States with state law was not intended to represent an acceptance of its restrictions or to constitute a rejection of reserved rights.

Even if the Forest Service policy could be read to constitute a decision by the Service to relinquish reserved rights on forest lands, the Master-Referee would be of the opinion that the policy could not divest the United States of its national forest reserved rights. It is settled that the interpretation of a Congressional enactment fairly susceptible to varying interpretations by those charged with its execution are entitled to great respect when used in determining the intent of the enactment. *Udall v. Tallman*, 380 U.S. 1, 85 Sup. Ct. 792, 13 L. Ed. 2d 616 (1965); *Zemel v. Rusk*, 381 U.S. 1, 85 Sup. Ct. 1271, 14 L. Ed. 2d 179 (1965). An administrative construction which is incorrect, however, must be rejected by a reviewing court. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 93 Sup. Ct. 2507, 37 L. Ed. 2d 688 (1973). The Master-Referee is of the opinion that an administrative rejection of reserved rights would be improper and of no effect upon the government's reserved rights. Only Congress is empowered to manage and dispose of federal property. *United States Const.*, Art. IV, §3.

Since the Master-Referee, as more fully described in subsequent sections, is of the opinion that the United States did reserve waters appurtenant to the national forests in this matter, any administrative construction which purported to divest the United States of these rights would be *ultra vires*, violative of the Constitution and contrary to the intent of the Congress to establish the reserves. Acceptance of such an administrative construction would divest the United States of a lawful property right by administrative action—something prohibited by Article IV, §3 of the Constitution.

The Master-Referee concludes that the filings and claims of the Forest Service made according to state water law under the Forest Service policy, for the reasons above, do not divest the United States of its reserved rights on the Colorado national forests involved herein.

4. *The Acts of July 26, 1866, and July 9, 1870, and the Desert Land Act of 1877.*

The objectors contend that the Lode Law of July 26, 1866, the Act of July 9, 1870, and the Desert Land Act of March 3, 1877, prohibit the establishment of federal reserved water rights. It is argued that these Acts were intended to sever the land and water on all federally-owned public lands and to make all such water subject to appropriation under the laws of the various states. The Master-Referee is of the opinion that these Acts, as interpreted by the United States Supreme Court, were not intended to constitute a full divestment of the rights of the United States to the use of reserved waters on federal reserved lands.

a. *The Provisions of the Acts.*

The Lode Law of July 26, 1866, as codified at 30 U.S.C. §51, provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures

or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (emphasis supplied)

The Act of July 9, 1870, as modified in 1891 and codified at 30 U.S.C. §52, provides:

"All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title."

Finally, the Desert Land Act of 1877, as codified at 43 U.S.C. §321 *et seq.*, provides in pertinent part:

"That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." (emphasis supplied)

b.Scope of the Acts as Interpreted by the United States Supreme Court.

There can be no doubt that these Acts, on their face, opened up to appropriation under state law the non-navigable waters on the public lands of the United States. In *California Oregon Power Co. v. Bever Portland Cement Co.*, 295 U.S. 142, 55 Sup. Ct. 725, 79 L. Ed. (1935), the Supreme Court said of the Acts of 1866 and 1970:

"The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain." (emphasis supplied)

The Court was even more emphatic concerning the effect of the Desert Land Act:

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v Johnson (C.C.) 89 F. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named." (emphasis supplied)

The *Beaver Portland* decision makes it clear that all waters on *public lands* must be considered to be open to appropriation under applicable state law.

These declarations, however, cannot be interpreted to mean that the United States has similarly made all waters on *reserved lands* subject to appropriation under state law. The Supreme Court has expressly limited the effect of the Acts of 1866 and 1870 and the Desert Land Act and the holdings of *Beaver Portland* to the *public lands* of the United States. As the court said in *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 Sup. Ct. 832, 99L Ed. 1215 (1955):

"The nature and effect of these Acts have been discussed previously by this Court. The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights on public lands asserted under local laws and customs. Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240. The Desert Land Act severed, for purposes of private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356. See also, State of Nebraska v. State of Wyoming, 325 U.S. 589, 611-616, 65 S. Ct. 1332, 1347-1350, 89 L. Ed. 1815.

"It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the expressed delegation or conveyance of power that is claimed

by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers sources of water supply upon the public lands * * *. The lands before us in this case are not 'public lands' but 'reservations.' ”
(double underlining supplied)

This rationale was expressly affirmed by the Supreme Court in its recent decision in *Cappaert v. United States*, _____ U.S. _____ (June 6, 1976) (44 L.W. 4736), in which the Court refused to overrule the *Federal Power Commission* decision.

None of the claims of the United States made in these matters for reserved water rights is sought for land which is a part of the public domain. Rather, all of the claims are made for water on or appurtenant to various federal reservations. Since the Acts in question cannot be considered to be applicable on reserved lands, the Master-Referee must conclude that these Acts do not prohibit the establishment of federal reserved water rights in these matters.

5. Was Water Reserved for Use on the Various Reservations Involved Herein?

Having concluded that the various arguments raised by the objectors do not strip the United States of its power to reserve waters in Colorado, the Master-Referee must next determine whether the federal government actually exercised that power when it created the various reservations involved in this litigation. More precisely, the question to be investigated is whether the United

States, as a factual matter, intended to reserve waters for the reservations when it created them.

In general, water cannot be said to have been reserved for the benefit of a particular federal reservation of land unless the United States can show that it intended to so reserve the water. *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971); *Cappaert v. United States*, _____ U.S. _____ (June 7, 1976) (44 L.W. 4236). The intent need not be express but may be implied from the circumstances surrounding the reservation. *Winters v. United States*, *supra*; *Arizona v. California*, *supra*; *United States v. District Court in and for Eagle County, Colorado*, *supra*; *Cappaert v. United States*, *supra*. The implied intent rationale was originally established in *Winters*, *supra*, a case dealing with reserved waters appurtenant to a Montana Indian reservation. The Court held there that, since waters were necessary to accomplish the purpose of the reservation, the government must have intended to reserve waters for its benefit. The *Winters* rationale was later affirmed in connection with Indian reservations in *Arizona v. California*, *supra*, where the Court found an implied intent to reserve waters for five Arizona Indian reservations.

None of the reservations involved in this matter are Indian reservations. Despite this, it is clear that the implied intent rationale developed in relation to Indian reservations applies equally to other forms of federal withdrawals. In *Arizona v. California*, *supra*, reserved rights appurtenant to four non-Indian reservations were recognized without any finding that the waters were expressly reserved by the United States. The rationale was

even more clearly extended in *United States v. District Court in and for County of Eagle, Colorado, supra*, wherein the Court stated that waters may be reserved for "any federal enclave" and that "the reservation may be only implied." If any doubts about the rationale remained after *Eagle County*, they were surely laid to rest by *Cappaert v. United States, supra*, in which the Court stated, in a case dealing with reserved rights on a national monument, that intent to reserve " . . . is inferred if previously unappropriated waters are necessary to accomplish the purposes for which a reservation was created." The Master-Referee concludes that the implied intent rationale is equally applicable to any form of federal reservation.

The implied intent rationale is particularly important in these matters since none of the statutes or reserving documents for the instant reservations manifests any express intent to reserve appurtenant waters.* Based on the evidence submitted, however, it appears that the United States did intend to reserve waters sufficient to carry out the purposes of the Colorado reservations involved in this case. Water was and is necessary to effectuate the purposes of the reservations and the Master-Referee is of the opinion that such water was impliedly reserved by the United States for the benefit of each of the reservations in question. Without water the purposes of the reservations would be frustrated. It is in the light of these facts and the decisions of the United States Supreme Court that the Master-Referee concludes that the United States did reserve waters to achieve the purposes of all the reservations involved in these matters.

C. Purposes for Which the Reservations Were Created.

The threshold conclusion that the United States did

exercise its power to reserve waters appurtenant to the instant reservations is only the initial step in the analysis of the issues in this case. Mere recognition of the right does nothing to define and limit its scope as is required by the reservation doctrine. Three additional questions must be determined to define the scope of the reserved right as it exists in favor of each reservation:

1. What are the purposes of the reservation to be served by the reserved right?
2. What amount of water is the United States entitled to utilize under the right for each purpose?
3. What priority date is each reservation entitled to for the purpose of administration by the Colorado state engineer?

Since each type of reservation was created for different purposes, it is necessary to deal separately with each form of reservation involved herein.

1. Purposes of the National Forests.

The issue of purposes of the national forests was extensively briefed and argued by the United States and the objectors in this matter. Mountains of evidence were presented at the various hearings before the Master-Referee. No other type of reservation involved herein was so hotly contested by counsel. The Master-Referee believes that the identification of forest purposes constitutes one of the most important issues in this case. The amounts of water claimed by the United States, which are hinged directly to the purposes of the reservations, appear to be greater for the various forests than for any other type of reservation. Any limitation of forest purposes beyond those asserted by the United States will have an immense effect on the amounts of reserved water ultimately awarded in this

action. For these reasons, the discussion of the nature of the purposes of the national forests will be more extensive than that regarding the purposes of other types of reservation. This is not to minimize the importance of the others, but simply reflects the importance given by the parties to and merited by the issue of the national forest purposes.

a. Contentions of the United States and the Objectors.

1. United States' Position.

In its various statements of claim and applications the United States claimed that the national forests were created under the Organic Act of 1897, 16 U.S.C. §475, for the following numerous purposes:

1. Growth, management, and production of a continuous supply of timber;
2. Recreation;
3. Domestic uses;
4. Municipal and administrative-site uses;
5. Agriculture and irrigation;
6. Stock grazing and watering;
7. The development, conservation, and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;

8. Fire fighting and prevention;
9. Forest improvement and protection;
10. Commercial, drinking, and sanitary uses;
11. Road watering;
12. Watershed protection and management and the securing of favorable conditions of water flows;
13. Wilderness preservation;
14. Flood, soil, and erosion control;
15. Preservation of scenic, aesthetic, and other public values;
16. Fish culture, conservation, habitat protection, and management.

It is with respect to the final category that the United States claims the right to the maintenance of continuous, uninterrupted flows of water and minimum stream and lake levels. Although the United States continued to assert these broad purposes in its Opening Brief, *see* Opening Brief of the United States, pp. 9-11, the United States later* appeared to retreat from these broad purposes and adopt the position that the forests were originally created and established for only five purposes. Those are:

1. The protection of watersheds and the main-

*In its Reply Brief, Supplemental Reply Brief, and Oral Argument.

tenance of natural flow in streams below the sheds;

2. Production of timber;
3. Production of forage for domestic animals;
4. Protection and propagation of wildlife; and
5. Recreation for the general public.

See Reply Brief of the United States, p. 1; Supplemental Reply Brief of the United States, pp. 29-31; Tr., Dec. 5, 1975, p. 21. This revised position relies heavily upon the Master's Report in *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963), which found that the national forests there involved were indeed established for those same five purposes cited above, based on the Multiple-Use Sustained-Yield Act of 1960. That Act, as now codified at 16 U.S.C., §§528 to 531, provides in pertinent part at §528;

"It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."

The United States also argues that proper interpretation of the Organic Act of 1897 also bears out its contention that the forests were originally established for the five purposes enumerated in 1960. The Organic Act, codified at 16 U.S.C. §475, provides in pertinent part:

"No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water

flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ."

2. Objectors' Position.

The objectors adopt a far more limited view of the national forest purposes. They contend that until 1960 the purposes of the forests were strictly limited to those specifically stated in the 1897 Organic Act. They contend that no range, recreation, or wildlife and fish purpose can possibly be attributed to the national forests until 1960 when the Multiple Use Act expanded the original purposes.

Since the reserved right exists only to serve the purposes of the forests and since the reserved right for national forests may be granted a priority date no earlier than the date a forest purpose first existed, the date on which each forest purpose came into existence is a crucial determination.

b. Conclusion of the Master-Referee.

After fully analyzing the issues raised by the parties herein, the Master-Referee is of the opinion and concludes that the national forests were established by the Organic Act of 1897 for only the limited purposes specified therein. Not until 1960, with the passage of the Multiple Use Act, were the forest purposes expanded to include range, recreation, and wildlife and fish purposes. Based on this conclusion, the Master-Referee is of the opinion that the United States cannot be awarded a reserved right for minimum stream flows and lake levels in the national forests having a priority date earlier than the effective date of the Multiple Use Act of 1960. The reasons for this conclusion are addressed in the subsequent sections.

c. The 1963 Decision of *Arizona v. California*.

In *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct.

1468, 10 L. Ed. 2d 542 (1963), the Supreme Court for the first time recognized the existence of reserved rights appurtenant to federal enclaves other than Indian reservations. One such enclave was the Gila National Forest. In doing so, the Court affirmed the findings of the Special Master who had also found that reserved rights existed on the Gila National Forest. *Arizona v. California*, Report of the special Master, p. 293. Unlike the Master, the Supreme Court did not specifically address the issue of the purposes of the national forests, nor the Gila National Forest in particular. The Master only once touched upon the subject in his long report. He stated at page 96:

"There are eleven National Forests in the Lower Colorado River basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.

The United States relies heavily upon this statement of the master to conclude that the forests, as established by the Organic Act of 1897, were created to serve all of the purposes mentioned by the Master. It contends that the report of the Master was adopted and approved by the Supreme Court with respect to this specific finding. United States Reply Brief, p. 1-2.

The Master-Referee is of the opinion that the decision of the United States Supreme Court in *Arizona v. California* did not address or settle the issue of the purposes of the national forest. For the reasons discussed below, the Master-Referee believes that this question is still open to

consideration despite *Arizona v. California* and that its consideration may properly be address in this litigation.

1. Comments in Arizona v. California, supra, Regarding the Report of the Special Master.

In its opinion in *Arizona v. California*, the Supreme Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

"In these proceedings, the United States has asserted claims to waters in the main river and in some of the tributaries for use on Indian Reservations, National Forests, Recreational and Wildlife Areas and other government lands and works. While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. *We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian Reservations.*

Regarding the decree of the Master, the Supreme Court had this to say in its opinion:

"While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will

allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court."

The decree ultimately adopted by the Supreme Court made no reference to the purposes for which the national forests were originally established. See *Arizona v. California*, 376 U.S. 340, 84 Sup. Ct. 755, 11 Ed. 2d 757 1964. Neither, for that matter, did the decree proposed by the Master specifically state the purposes of the national forests.

The question raised by all of this is whether the Supreme Court actually did approve the findings and rulings of the Master regarding forest purposes or whether that issue was left undetermined by the Court and hence open to decision herein.

2. The Supreme Court Did Not Specifically Approve the Conclusion of the Master Regarding Forest Purposes.

The only comment in *Arizona v. California* addressing the issue of reserved rights for non-Indian enclaves made by the Supreme Court was the following:

"The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future

requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."

While this brief statement constitutes a clear expansion of the reservations doctrine, the Master-Referee cannot conclude that this statement in and of itself is an adoption and approval of all the findings of the Special Master, including those concerning the purposes of the national forests. Thus, the Master-Referee has closely examined the statements of the Court cited in (1) *supra*, to determine whether the Court otherwise adopted those findings of the Special Master.

Initially, it should be reemphasized that the Supreme Court specifically approved, though it did not adopt, only the decree recommended by the Master regarding the claims of the United States. It did not specifically adopt his findings and conclusions as well. This is particularly significant since the Master's statement of forest purposes appears only in his preliminary findings and not in the decree itself. Naturally, the Master-Referee recognizes that any decree must be based on preliminary findings and conclusions. Approval of the decree, however, does not automatically imply approval of every preliminary finding and conclusion, especially when, as in *Arizona v. California*, the decree was not ultimately adopted by the Supreme Court. A careful analysis of the opinion and decree of the Supreme Court in *Arizona v. California* indicates that the Court did not intend to adopt or approve the conclusions of the Master regarding the purposes for which the national forests were established.

In the decree it did adopt, the Supreme Court, as the Master did in his decree, granted to the Gila National Forest reserved waters sufficient "to fulfill the purposes

of the Gila National Forest . . .” *Arizona v. California*, 376 U.S. 340, 350, 84 Sup. Ct. 755, 761, 11 L. Ed. 2d 757 (1964). No elaboration of what those purposes were was made by the Court. That the reserved right doctrine existed to serve the purposes for which Indian reservations were created was known since *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908). By its decree, the Court extended the recognized rationale of *Winters* to permit reserved waters to be applied to fulfill the purposes of various non-Indian reservations as well. At most, the Court’s approval of the decree of the Master can be read to constitute an approval of the Master’s application of the *Winters* rationale to non-Indian enclaves. To interpret its approval of the decree to be an approval of the Master’s findings regarding the nature of national forest purposes would be to read language into the Master’s decree which does not appear and would thus impermissibly broaden the Court’s approval of the decree.

This conclusion is particularly compelling in light of the fact that there is no indication that the Supreme Court addressed the issue of forest purposes at all. The Court itself noted that it *had not ruled on some questions* addressed by the Master. *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963), as cited above. The purposes issue appears to be one area not broached by the Court. The opinion and decree of the Court was utterly devoid of any reference to the purposes for which the forests were established. This is certainly evidence that the issue was not confronted by the Court. Moreover, an examination of the briefs and other materials before the Court in *Arizona v. California* indicates that the issue was not one raised for the Court’s consideration. Rather, the issues raised by the parties concentrated almost exclusively upon whether reserved rights could in fact exist for the benefit of non-Indian

enclaves. This is to be expected since no prior case had so found and the parties were clearly more interested in litigating the existence of the right than its potential scope. Indeed, if anything, the Court was probably under the impression that the forest purposes were only those stated in the Organic Act of 1897. In its Proposed Findings of Fact, Conclusions of Law, and Decree, and in its Brief in support thereof, the United States recognized that the 1897 Act stated the forest purposes. At p. 59 of its Brief in support the United States said:

“The national forests are *used* for the protection of watersheds to maintain the natural flow of the streams below, for the production and harvesting of timber, for the production and harvesting of forage for domestic livestock permitted on the reservations, for the protection and propagation of fish and wildlife, and for recreation uses by the general public. (United States’ Proposed Finding 8.1.) *Particularly significant is the fact that the Act of June 4, 1897, prescribing the PURPOSES for which public lands could be reserved as national forests provided, inter alia, that ‘no national forest shall be established, except to improve and protect the forests within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; **** (30 Stat. 34; 16 U.S.C. 475.” (emphasis supplied)

If the Supreme Court reached a conclusion as to the purposes of the national forests, it certainly was not included in the opinion. The briefs and other materials before the Court tend to indicate that, if such was at issue at all, it was peripheral to the major issue faced by the

Court—whether the reserved right existed at all for non-Indian reservations.

Finally, and most importantly, the *Arizona v. California* opinion gives an *affirmative* indication that the forest purposes issue was not intended to be settled by the Court. At 373 U.S. 546, 593, 83 Sup. Ct. 1468, 1495, 10 L. Ed. 2d 542, 575, (1963), the Court, in reference to the claims of the United States for reserved rights, stated: “we shall discuss only the claims of the United States on behalf of the Indian Reservations.” While the Court may well have approved the decree of the Master, it seems clear from this statement that the Court did not intend to foreclose future analysis and discussion of the reserved rights issue relating to various non-Indian reservations. Indeed, nine years later, in *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971), the Court reemphasized the fact that it had not fully addressed and resolved all issues concerning non-Indian reserved rights claims when it stated:

“As we said in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Federal Government had the authority both before and after a State is admitted into the Union ‘to reserve waters for the use and benefit of federally reserved lands.’ *Id.*, at 597, 83 S.Ct. at 1496. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. *Id.*, at 598-601, 83 S.Ct. 1496-1498” (double emphasis supplied)

This quotation again evidences the intent of the Supreme Court in *Arizona v. California* to expand the general scope

of the reservation doctrine to non-Indian lands without foreclosing future, well-considered determinations of the right’s specific ingredients.

Finally, it cannot be argued that the decree of the Supreme Court in *Arizona v. California* forecloses the purposes issue by granting specific amounts of water to the forest based on the purposes found by the Master. The Master quantified the amount of water granted to the Gila National Forest only to the extent of finding that the uses were *de minimis* and hence unnecessary of precise quantification. Because of this, no inference of the purposes to be served can be made from the amounts granted.

Based on the foregoing, the Master-Referee can only conclude that the Supreme Court in *Arizona v. California* did not intend to adopt the findings of the Master regarding the specific purposes of the national forest. The statements of the Court in its opinion and decree and all other indications cited by the Master-Referee plainly show that the primary interest of the Court regarding the non-Indian reservations was in extending the general reserved right doctrine to them. The Master-Referee is of the opinion that the Court did not intend to foreclose future courts from examining the specific question of national forest purposes.

d. *Statutes Creating the National Forest System and Interpretations Thereof.*

Both the United States and the objectors have relied on the same statutes which create and regulate the national forest system to support their widely-differing contentions regarding the national forest purposes.

(1) *The Creative Act of 1891, 16 U.S.C. §471.*

The national forest [then called forest reserves] system was created by Congress in the Creative Act of 1891. That

enactment, as now codified at 16 U.S.C. §471, provides in pertinent part:

"The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof."

The Act itself was devoid of any reference to the purposes of the national forests, a fact for which it was later criticized. Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Res. Law. 503 (1974); see also "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of The Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897. Since the 1891 Act itself is unhelpful, the Master-Referee may resort to various interpretive aids in determining the meaning of the statute. *Flora v. United States*, 357 U.S. 63, 78 Sup. Ct. 1079, 2 L. Ed. 2d 1165 (1958); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 Sup. Ct. 599, 78 L. Ed. 1109 (1934). These aids lead to the conclusion that the forest reserve system was established for the dual purpose of watershed protection and preservation of timber.

A memorial of the American Forestry Association in 1890 urged the Congress to:

"... secure the magnificent forests on these lands from destruction by axe and flame within a comparatively short

period . . . [They] will be needed as an important source of timber supply for the western states for all time to come . . . *the greatest value of these forests to the present and future inhabitants of the western states is in the assistance they render to agriculture through their influences on the water supply and the climate* . . . there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulator of rainfall and water supply." (emphasis supplied) 21 Cong. Rec. at 2537-38, 51st Cong., 1st Sess., 1890.

That this was the intent of the Creative Act of 1891 is further evidenced by the administrative construction given the Act by the then Division of Forestry. In its report for 1891, the Division stated in pertinent part:

"There can hardly be any doubt, however, as to what objects and considerations should be kept in view in reserving such lands and withdrawing them from private occupancy. These are first and foremost of economic importance, not only for the present but more especially for the future prosperity of the people residing near such reservations, namely, first, to assure continuous forest cover of the soil and mountain slopes and crests for the purposes of preserving or equalizing water flow in the streams which are to serve the purposes of irrigation, and to prevent formation of torrents and soil-washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously

and with a view to reproduction. Secondary objects, such as can and will be subserved at the same time with those first cited are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. Both objects are legitimate, but the first class is infinitely more important, and the second is easily provided for in securing the first.

"Since there have arisen misconceptions in regard to these propositions it may, perhaps, be proper to emphasize the fact that the multiplication of national parks in remote and picturesque regions was not the intent of the law, but it was specifically designed to prevent the great annual conflagrations, to prevent useless destruction of public property, to provide benefit and revenue from the sale of forest products as needed for fuel and lumber by residents of the locality, and altogether to administer this valuable and much endangered resource for present and future benefit. These, I take it, are the objects of the proposed reservations." Report of the Chief of the Division of Forestry for 1891, pp. 223-5. (emphasis supplied)

As interpreted by the Division of Forestry, the purposes of the forest reserves were felt to be quite clear. Watershed protection for the benefit of users below the forest and timber preservation were the twin reasons for creation of the forest reserves. Although preservation of the forests

would naturally protect and increase the recreational and aesthetic opportunities provided within the forest, these were not the purposes behind the reservations. *See also Ex Parte Hyde*, 194 Fed. 207 (N.D. Cal. 1904). That "multiplication of national parks . . . was not the intent of the law," was also strongly reinforced by the enactment of the Organic Administration Act of 1897, 30 Stat. 34.

(2) *The Organic Administration Act of 1897, 30 Stat. 34 (1897).*

The Creative Act of 1891 was regarded by Congress as an ineffectual mechanism for the creation and administration of the forest reserves. Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Res. Law. 503 (1974); *see also* "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897. Indeed, not only was the Act itself unclear as to the very purposes for which forest reserves could be created, but it also failed to provide any system whatsoever for the administration of the reserves. *Id.* Congress was particularly concerned that it had created forest reservations of indiscriminate size, purpose, and formation which would hinder the economic development of the western states. 30 Cong. Rec. 900, 908, 55th Cong., 1st Sess., 1897. In order to correct the shortcomings of the Creative Act, Congress passed the Organic Administration Act of 1897. 30 Stat. 34 (1897). Among its provisions was a clear statement of purposes for which forest reserves could be established and a set of criteria governing use and administration of the forests.

(a) *Statement of Forest Purposes.*

One of the most important contributions of the Organic Act of 1897 was its clear and conclusive statement of the

purposes for which forests could be created. In pertinent part, as now codified at 16 U.S.C. §475, the Act provides:

"All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. *No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States;* but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." (emphasis supplied)

The Master-Referee is of the opinion that the cited language expresses all of the purposes for which forest reserves could be created under the Organic Act of 1897. The Act is clear on its face that these constitute the *only* purposes of the national forests, at least until the passage of the Multiple-Use Act of 1960. The statement of purposes clearly indicates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful sup-

plies of timber therein from destruction. No mention is made of any recreational, aesthetic, or wildlife and fish purposes as are claimed by the United States to be part of the purposes established by the Organic Act of 1897. The words of the statute are clear and no broader interpretation or effect can be made than that which appears on their face.

(b) *Effect of 16 U.S.C. §551.*

Despite the clear limitation of forest purposes found in 16 U.S.C. §475, the United States contends that 16 U.S.C. §551 indicates that Congress envisioned broader purposes than those stated therein. Originally passed as part of the Organic Act of 1897 (at 30 Stat. 35), 16 U.S.C. §551 empowers the Secretary of Agriculture to make rules and regulations to insure objects of the forests through the control of their occupancy and use. It provides:

"The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

Because such multiple *uses* of the national forests as recreation and wildlife and fish management have been permitted and administered over the years under the cited section, the United States contends that the *purposes* of the forests must therefore be broader than those limited ones expressed by 16 U.S.C. §475. The Master-Referee is

of the opinion that 16 U.S.C. §551 in no way expands the purposes for which national forests can be established.

First, it is imperative to examine the language of 16 U.S.C. §551. It provides the Secretary of Agriculture with the power to make provisions for the protection of the national forests from fire and depredation. To do so the Secretary is empowered to make rules and regulations "... as will insure the *objects*..." of the reservation. These rules and regulations are to regulate the occupancy and *use* of the forests and preserve them from destruction. The Master-Referee is of the opinion that this provision does no more than order the Secretary to preserve the objects or purposes of the forests as they were enumerated in the Organic Act (16 U.S.C. §475) as discussed above.

One of the major deficiencies of the Creative Act of 1891 which the Organic Act was designed to remedy was the former's failure to provide a basis for the regulation and administration of the forests once they were reserved. Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Res. Law. 503 (1974); "The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of Forest Policy for the Forested Lands of the United States to the Secretary of the Interior," May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897. The Master-Referee concludes that section 551 was intended to remedy this deficiency. Thus, in order to insure that the forests achieved their stated objects or purposes (watershed protection and timber preservation), regulation of the various internal activities in the forests was essential lest those activities or uses should interfere with the paramount forest objects or purposes. That many *uses* could and would be made of the forests was surely known to Congress as is indicated in The Report of the Chief of the Division of Forestry for 1891. Indeed, the Organic Act, as

now codified at 16 U.S.C. §478, permitted "... any person (to enter) upon such national forests for all proper and lawful purposes..." *so long as* there was compliance with rules and regulations adopted under 16 U.S.C. §551. That some of these uses might even be recreational was also realized by Congress, albeit at a later date. Act of March 4, 1915, 16 U.S.C. §497. Certainly, such vast areas of land were never intended to be completely withdrawn from all lawful human *use*. But, Congress recognized that all *uses* of the forests would need to be regulated to insure the achievement of the specific statutory objects or purposes expressed in 16 U.S.C. §475. Consequently, the thrust of 16 U.S.C. §551 is to regulate forest *uses*, not to somehow equate forest *uses* with forest *purposes*. Indeed, the existence of this section indicates that Congress was concerned that the numerous uses to be made of the forest might be antithetical to the achievement of their purposes. Hence, the Secretary was empowered to regulate the uses appropriately.

Those cases which have dealt with 16 U.S.C. §551 fully support the conclusion of the Master-Referee. For example, in *United States v. Grimaud*, 220 U.S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1911), the issue before the Court was the propriety of the Secretary of Agriculture's regulation of grazing on national forest land. The Court first noted the purposes for which the forests were created:

"From the various acts relating to the establishment and management of forest reservations, it appears that they were intended 'to improve and protect the forest and to secure favorable conditions of water flows.' "

The Court then noted the regulatory power provided to the Secretary by §551 and went on to say:

"Under these acts, therefore, any use of the

reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. *To pasture sheep and cattle on the reservation at will and without restraint might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute.* The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another." (emphasis added)

The case could not be more clear. The Supreme Court recognized that the forests were established for the limited purposes stated by 16 U.S.C. §475. It quoted that section. It then went on to define clearly the intent of 16 U.S.C. §551. According to the Court, it existed to provide the Secretary the means to regulate *uses* on the forest which could indeed be "inconsistent" with the attainment of forest purposes even though permitted under 16 U.S.C. §478. The section in no way permitted the Secretary to legislate broader forest purposes than those in 16 U.S.C. §475. As the Court stated:

"Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."

In support of this construction, *see also Light v. United States*, 220 U.S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1911).

The case of *United States v. Hunt*, 19 F.2d 634 (D. Ariz. 1927) also lends support to the interpretation of the Master-Referee and conforms to the rationale established by *United States v. Grimaud*, *supra*. In that case, the United States sought to enjoin the State of Arizona from interfering with its administration of the Kaibab National Forest. Specifically, Arizona was attempting to assert the applicability of its game laws on the forest land. The United States alleged its right, in contradiction of any Arizona game laws, to regulate the deer population on the forest lands in order to protect young trees. The Court found that the state of Arizona could not apply its game laws on the forest lands and enjoined their applicability and enforcement on such. The Court based its decision upon the power of the Secretary of Agriculture to regulate the activities on national forest lands under 16 U.S.C. §551. The Court recognized the duty of the Secretary to protect the forest from destruction. Since the deer were feeding on the young trees within the forest, the Court found that the Secretary could lawfully act to preserve the trees even if in contradiction of Arizona law. Again, the interpretation of the Court is clear. Section 551 provides a mechanism for protecting forests purposes. It does not recognize forest uses, there the hunting of deer, as purposes for which water may be reserved.

The case of *United States v. Johnston*, 38 F. Supp. 4 (D. W. Va. 1941) also adopts the *Grimaud* rationale. The issue was the government's attempt to prohibit grazing by defendant upon lands of the Monongahela National Forest. Defendants contended that the fence laws of West

Virginia required the United States and themselves to share the cost of a fence between their lands and that the United States could not simply prohibit grazing without correspondingly assisting with the construction of a fence. The Court disagreed. The Court first noted the purposes of the national forests:

"The Congress has declared the purposes for which national forests are established to be improve and protect the forest within the reservation, and for the purpose of securing favorable condition of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States. 16 U.S.C.A. §475."

The intent of §551 was then addressed:

"The Congress authorized the Secretary of Agriculture to make such rules and regulations as would be necessary to insure the objects for the creation of such reservations, and the Congress made the violation of such rules and regulations a penal offense."

The Court went on to uphold the validity of the Secretary's regulations even though they may have violated West Virginia law. In doing so, the Court cited the *Grimaud* and *Light* decisions. Again, the intent of §551 could not have been more clearly expressed. The purposes of the forest are limited. Their achievement must be protected even if state law is not respected in the face of uses which may be inconsistent with them. Such an inconsistent use can certainly not be labeled a forest purpose. (The Master-Referee suggests that *United States v. Shannon*, 151 Fed. 863 (D. Mont. 1907) also supports his conclusion. Again, the issue was the regulation of grazing upon forest lands. The defendant claimed to be under no

obligation under state law to fence his cattle from the Little Belt Forest Reserve. The Court found that the United States was empowered to prohibit grazing on its forest land. The Court first noted the damage grazing had done to the forest:

"It sufficiently appears that damage to the water supply is done by the grazing of more cattle in Lone Tree Park than the number authorized by the Secretary of the Interior, and that the young growth of willows and underbrush is seriously injured by the tramping of cattle."

This damage interfered with the purposes of the forests as established in the Organic Act:

"Agriculture, lumbering, mining, and live stock interests are all more or less dependent upon a permanent and accessible supply of water, wood, and forage. *It need scarcely be said that plainly the whole policy of forest reservation rests upon legislation having regard for the future welfare, and is intended to foster and protect living and growing timber on forest reservations.* Act June 4, 1897, c. 2, 30 Stat. 35, 36, may be called an essentially constructive statute." (emphasis supplied)

To prohibit such interference, said the Court, Congress passed section 551 as part of the Creative Act:

"In the furtherance of this policy, and to make its execution effective, Congress also provided by the act just referred to that the Secretary of the Interior might make such rules and regulations, and establish such service, as would 'insure the objects of such

reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.' This was a delegation of significant power to the Secretary of the Interior. It gave to that official authority to construct in detail an administration which would make certain or 'insure', as the law puts it, the will of Congress with respect to forest reservations. *Protection of living timber, the cultivation of younger growths, protection against fire, protection against depredation — all are among the expressly enumerated features of the act. By explicit language, too, regulation of occupancy and use is included within the authority conferred, and was evidently regarded as a necessary part of the power which the Secretary should possess, to the end that the whole policy might be made as effective as possible.*" (emphasis supplied)

The Court upheld the Secretary's regulation on the basis of this analysis, finding Congress' power to mandate such regulation to supersede countervailing state law.

The Master-Referee is aware that the regulations of the Secretary of Agriculture need not necessarily be designed exclusively to prevent destruction of the national forests. *United States v. Hymans*, 463 F.2d 615 [10th Cir. 1972]; *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965); *United States v. Reeves*, 39 F. Supp. 580 (W.D. Ark. 1941). Under the "occupancy and use" provision of §551 the Secretary may regulate public uses even though they do not endanger forest purposes. This is not inconsistent with the conclusion of the Master-Referee. The purposes of the forests were established by 16 U.S.C. §475. When it

enacted 16 U.S.C. §478 as part of the Organic Act, Congress recognized that there were many potential uses which would differ from but which would not be inconsistent with the forest purposes. Furthermore, Section 551 provides the power to regulate these uses as long as "... such rules and regulations tend to protect the lands and faithfully preserve the interest of the people of the whole country..." *United States v. Reeves, supra*. For example, the Secretary may regulate "skinnydipping" in the forests if it would preserve the interest of the public even though the practice would not destroy the forest. *United States v. Hymans, supra*. This does not imply that every such regulated use or activity rises to the level of a forest purpose. It simply permits the regulation of all forest uses, not only those necessary to the accomplishment of forest purposes, as may be desirable to protect the general public interest under 16 U.S.C. §478. The limited purposes of the forest are confined by statute and consistent interpretations thereof, however, to those limited ones expressed in the Organic Act itself. Indeed, as one of the objectors described it:

"The Government's argument here is the logical equivalent of contending that since Congress has authorized the Secretary of the Interior to regulate white traders on Indian reservations, Indian reservations were created to promote trading." Supplemental Brief of the Twin Lakes Reservoir and Canal Co., p. 11.

While 16 U.S.C. §478, §51, certainly recognizes that multiple forest uses were permissible even under the Organic Act of 1897, those uses were required to be regulated simply to insure the objects of the forest. The Master-Referee concludes that §551 in no way expands the limited purposes stated in 16 U.S.C. §475.

(c) *Scope of the Words: "... to improve and protect the forest within the boundaries ..."*

The United States also contends that the use of the words "... to improve and protect the forest within the boundaries ...", see 16 U.S.C. §475, by Congress in its statement of forest purposes somehow expands the original purposes of the forest beyond those of watershed protection and timber preservation. It claims that this phrase somehow encompasses recreational and other purposes not otherwise explicit in the Act. The Master-Referee does not agree.

First of all, such an interpretation is wholly inconsistent with the cases which have addressed the purposes of the Organic Act. See, for example, *United States v. Grimaud*, *supra*; *Light v. United States*, *supra*; *United States v. Hunt*, *supra*; *United States v. Johnston*, *supra*; *United States v. Shannon*, *supra*; see also *Honchok v. Hardin*, 326 F. Supp. 988 (D. Md. 1971). Those cases clearly indicate that the essential purposes of the forest expressed in the Organic Act are limited to watershed protection and timber preservation. Forest improvement and protection are merely mechanisms to assure that the forests maintain their value for the expressed purposes.

In addition, the words of the Act themselves are clear as to the meaning of this phrase. At most, the phrase can be read to relate to the need to regulate and protect the forests in order that they may retain their value as protectors of the watershed and sources of timber supply. Nothing in the Organic Act, in 16 U.S.C. §475 or otherwise, hints that the purposes of the forest were to be greater than those. To so interpret the cited phrase would expand the meaning of the Act beyond its own limits and the interpretations of reviewing courts.

(d) *Interpretation of the Organic Act of 1897 in Light of Various Interpretive Aids*

The United States contends that proper construction of the Organic Act of 1897 reveals that the purposes of the Act are indeed broader than watershed protection and timber preservation. It offers several recognized techniques of statutory interpretation to support its assertion. The Master-Referee is of the opinion that these interpretive techniques, if they may properly be employed here, reveal that the purposes of the forests are in fact fully set forth by 16 U.S.C. §475.

The Master-Referee recognizes that it is his duty to glean the legislative intent of the various statutes presented to him for interpretation. To do so, the Master-Referee must utilize every aid to statutory construction in order to discover the true meaning of a statute as intended by the lawmaking body. *Flora v. United States*, 362 U.S. 145, 80 Sup. Ct. 630, 4 L. Ed. 2d 623 (1960); *United States v. Cooper Corp.*, 312 U.S. 600, 61 Sup. Ct. 742, 85 L. Ed. 1071 (1941); *United States v. Kung Chen Fur Corp.*, 188 F. 2d 577 (U.S. Cust. Ct. 1951).

The primary aid, of course, in divining the legislative intent of a statute is the statute's own wording. *Caminetti v. United States*, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 Sup. Ct. 599, 78 L. Ed. 1109 (1934); *Robinson v. State*, 155 Colo. 9, 392 P.2d 606 (1964). The various extrinsic aids cannot be invoked unless the statute itself is ambiguous; they may not be invoked to create ambiguity. *United States v. Kung Chen Fur Corp.*, *supra*. The Master-Referee is of the opinion that the words of the Organic Act of 1897 clearly express the purposes for which Congress intended the national forests to be established. Numerous cases support the Master-Referee's finding of

such limited purposes. *United States v. Grimaud, supra; Light v. United States, supra; United States v. Hunt, supra; United States v. Johnston, supra; United States v. Shannon, supra; Honchok v. Hardin, supra; Ex Parte Hyde*, 194 Fed. 207 (N.D. Cal. 1904). Resort to extrinsic aids is unnecessary and probably improper in this matter.

The Master-Referee, however, understands that words are inexact tools and that reference is often had to various interpretive aids even where the statute appears to be clear on its face. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 93 Sup. Ct. 408, 34 L. Ed. 2d 375 (1972); *Harrison v. Northern Trust Co.*, 317 U.S. 476, 63 Sup. Ct. 361, 87 L. Ed. 407 (1943). The Master-Referee has therefore examined the contention of the United States that various tools of statutory construction reveal that purposes broader than those expressed in 16 U.S.C. §475 were intended by the Organic Act. As a result of his investigation, the Master-Referee remains convinced that just the opposite is true.

(i) *Statutory History.*

The legislative history of an act of Congress is frequently the most fruitful source of instruction as to its proper interpretation. *Flora v. United States*, 362 U.S. 145, 80 Sup. Ct. 630, 4 L. Ed. 2d 623 (1960). That the purposes of the national forests were envisioned by Congress to be economic rather than recreational or aesthetic is clearly displayed in a statement by Rep. McRae of Arkansas, one of the chief sponsors of the Organic Act of 1897. He said:

"Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a

steadier flow, with fewer overflows and less low water.

"As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

"The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.

"It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established." 30 Cong. Rec., p. 966, (emphasis supplied).

This statement leaves no doubt that Congress fully considered the purposes to be accomplished by the national

forests and that it fully expressed these purposes in 16 U.S.C. §475. Recreation, while considered a proper forest use, was clearly rejected as a forest purpose. The forests were not to be parks set aside for nonuse. They were intended to protect the watershed for the benefit of irrigators and other economic users and to preserve a supply of timber. The institution of minimum stream flows or lake levels to fulfill various noneconomic purposes was clearly not considered.

Senator White of California bolstered this interpretation of the purposes of the forests when he said: "We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply." 30 Cong. Rec., p. 917.

The joint purposes of watershed protection and timber preservation were expressed by Rep. Ellis of Oregon as well:

"They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such . . .

"... as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.

"I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply." 30 Cong. Rec., pp. 1006-07. (emphasis supplied)

No inference that the forests had any recreational purpose is possible.

Even the Report of the Committee on the Inauguration of Forest Policy, May 1, 1897, Sen. Doc. No. 105, 55th Cong., 1st Sess., 1897, which addresses the broad topic of forest policy in general, is vacant of any reference to recreational purposes of the forests. It, too, concentrates on the functions of the forests as protectors of the watershed and sources of timber supply. In pertinent part, it states at p. 8: "The influence of forests upon climate, soil, and the flow of water in streams has attracted much attention during the past century."

Later at p. 36 it continues:

"Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . .

. . .

"It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western America is dependent upon irrigation." (emphasis supplied)

In opposition to the creation of national forests for the limited purposes of watershed and timber protection is the Report's suggestion that parts of two forest reserves be set aside as national parks. The Report indicates that these two areas, Mt. Rainier and the Grand Canyon, contain

"... features of supreme natural beauty ..." and that they therefore ought to "... be preserved for the enjoyment and instruction of the world by creating them national parks ..." Report, at p. 35. This recommendation clearly indicates that, as Rep. McCrea said, national forests were not contemplated as parks set aside for nonuse. Such areas were treated differently and reserved for different purposes.

The legislative history of the Organic Act could not be more clear. It contains not even a hint that national forests were intended to encompass any but the twin purposes of watershed protection and timber preservation. Recreation was not considered to be a purpose, and indeed was rejected as a forest purpose. The creation and protection of the national forests under the Organic Act were solely for the purposes stated in 16 U.S.C. §475. The Master-Referee notes that the legislative history fully support his position on 16 U.S.C. §551 as well as his interpretation of the "... improve and protect ..." language of 16 U.S.C. §475. On the basis of the legislative history, the Master-Referee is convinced that his conclusion as to the purposes of the national forests is correct.

(ii) *Administrative Interpretations.*

Despite the convincing legislative history of the Organic Act, the United States contends that the construction of the act by various administrators indicates that Congress intended broader purposes than those specifically expressed in 16 U.S.C. §475. It is well settled that the practical construction of a statute or act of Congress, *fairly susceptible of different constructions*, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. *Udall v. Tallman*, 380 U.S. 1, 85 Sup.

Ct. 792, 13 O. Ed. 2d 616 (1965); *Zemel v. Rusk*, 381 U.S. 1, 85 Sup. Ct. 1271, 14 L. Ed. 2d 179 (1965); *Bowman v. Eldher*, 149 Colo. 551, 369 P.2d 977 (1962). In spite of his conclusion that the Organic Act is not fairly susceptible of differing constructions, the Master-Referee recognizes the United States' contention that the undisturbed administrative construction of the Organic Act by those charged with its execution (permitting recreational, aesthetic, and other uses of the national forests) indicates that Congress intended these uses to constitute forest purposes under the Act. The Master-Referee has examined these constructions and cannot agree.

In its Reply Brief, the United States offers numerous citations from various administrative manuals, letters, and other documents prepared by various administrators to prove its contention. Many of these do indeed deal with recreational, aesthetic, scenic, and wildlife and fish uses of the forests. Upon examination, it become clear that these citations reveal only that recreational and other related uses have never been considered to be more than a proper and lawful use of the forests and indeed never a *purpose*.

The earliest administrative comment cited by the United States is from the 1902 edition of the Forest Reserve Manual. At page 8 appears the following:

"All law-abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims, and for pleasure and recreation." U.S. Ex. E-1.

Rather than constitute an expanded administrative interpretation of the purposes of the national forests, this section paraphrases 16 U.S.C. §478, enacted as part of the Organic Act at 30 Stat. 36. It simply restates that persons may enter the forests for all lawful reasons, including

recreation. If anything, Congressional acquiescence in this interpretation only shows that recreation is a proper forest *use* under 16 U.S.C. §478, despite the fact that it is not mentioned therein. The Master-Referee has no dispute with that. The cited section cannot be read, however, as an administrative expansion of forest *purposes*.

In 1905 the Department of Agriculture published its forest reserve *Use Book*. At page 49 thereof it was stated:

"... hotels, stores, mills, summer residences and similar establishments will be allowed upon reserve lands *wherever the demand is legitimate and consistent with the best interests of the reserve.*" Use of the National Forest Reserves, 1905 (U.S. EX. E-15). (emphasis supplied)

Again, the Master-Referee is at a loss to see how this statement reinforces the conclusion that recreation was a *purpose* of the forests under the Organic Act. It states only that certain recreationally-related *uses* may be allowed if "... consistent with the best interests of the forest ...". The *Use Book* simply recognizes that recreation is a legitimate forest *use* under 16 U.S.C. §478, though regulable under 16 U.S.C. §551 to preserve the best interests of the forest. It does not establish the use as a *purpose*.

The United States makes much of several statements found in the 1906 edition of the *Use Book* to support its contentions. It cites in pertinent part the following:

"On the theory that the management of land, not of forests, was chiefly involved, this law gave the Secretary of the Interior authority over the reserves ...

"The regulations and instructions for the use of the National Forest reserves here published are in accordance with the act last mentioned and the various supplementary and amendatory laws passed since June 4, 1897. They are based upon the following general policy laid down for the Forest Service by the Secretary of Agriculture in his letter to the Forester dated February 1, 1905:

" 'In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies. All the resources of forest reserves are for *use*, and this *use* must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources ... In the management of each reserve local questions will be decided upon local grounds; the dominant industry will be considered first, but with as little restriction to minor industries as may be possible; sudden changes in industrial conditions will be avoided by gradual adjustment after due notice, and where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run.' " The Use of the Forest Reserves (1906), pp. 15-17. (U.S. Ex. B-33) (emphasis supplied)

The Master-Referee has no argument with the *Use Book's* interpretation. It merely restates and reaffirms that the Organic Act has always allowed lawful and proper uses on the forest. The forests were not parks set aside for nonuse. This section, however, cannot be understood to expand forest purposes in any measure. Nothing in its language states anything which would support such an expansion. Interestingly, statements made in the *Use Book* immediately before and after the cited paragraph clearly indicate that this section was not intended to contemplate an expansion of forest purposes. At p. 13 is found the following:

"Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forests and range.

...

"We know that the welfare of every community is dependent upon a cheap and plentiful supply of timber; that a forest cover is the most effective means of maintaining a regular stream flow for irrigation and other useful purposes, and that the permanence of the livestock industry depends upon the conservative use of the range. The injury to all persons and industries which results from the destruction of forests by fire and careless use is a matter of history in older countries, and has long been the cause of anxiety and loss in the United States. The protection of the forest resources still existing is a matter

of urgent local and national importance. This is shown by the exhaustion of lumbering centers, often leaving behind desolation and depression in business; the vast public and private losses through unnecessary forest fires; the increasing use of lumber per capita by a still more rapidly increasing population; decrease in the summer flow on streams just as they become indispensable to manufacture or irrigation; and the serious decrease in the carrying capacity of the summer range." (emphasis supplied)

It is for the preservation of these forest purposes that the rules and regulations mentioned in the above *Use Book* citation were mandated. Indeed, it continues:

"You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the home builder first of all, upon whom depends the best permanent use of lands and resources alike. The continued prosperity of agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future use of these resources under businesslike regulations, enforced with promptness, effectiveness, and common sense. In the management of each reserve local questions will be decided upon local grounds; the dominant industry will be considered first, but with as little restriction to minor industries as may be possible; sudden changes in industrial conditions will be

avoided by gradual adjustment after due notice, and where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run." (emphasis supplied)

The implication is clear. Not only does the *Use Book* of 1906 as cited by the United States fail to support its contentions, but instead it provides a firm basis for a contrary conclusion.

That the Forest Service itself recognized that forest purposes were limited by the Organic Act and that it so construed the Act is further confirmed by the Report of the Chief Forester in 1913. The Report states:

"*The national forests are set aside specifically for the protection of water resources and the production of timber. . . . p. 10. (emphasis supplied)*

"*The fundamental aim in administering the national forests is to develop their resources for the permanent upbuilding of the country. The whole object of their administration would be defeated by closing the forests to development and maintaining them as a wilderness. The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on esthetic grounds.*" p. 11. (emphasis supplied)

This is a clear recognition by one of the highest Forest Service officials that the Organic Act states all of the forest purposes on its face. The concept that the forest are not parks to be set aside for economic nonuse is clearly expressed. This continuing administrative construction of forest purposes supports an interpretation in line with the plain language of the Organic Act.

The Master-Referee has examined each of the other citations offered by the United States and finds that only one can be said to support the government's position regarding the purposes of the national forests. That citation is to a study of recreational uses on the national forests commissioned by the Forest Service, Waugh, *Recreation Uses on the National Forests* (1918), U.S. Ex. E-3. The study presents the following observations:

"Recreation upon the Forest areas is a social utility of large dimensions and very substantial value.

"Recreation of many kinds, all legitimate, develops on practically all areas of the National Forests. It is inherent in the character of the Forests and must be recognized as a permanent and universal factor in Forest administration. Only by the most drastic and extraordinary administrative measures could recreation be excluded from particular Forest areas.

"Being a public utility of great value and being inevitable to the Forest administration, recreation should be developed by the Forest

Service on the same basis as any other Forest utility."

At p. 27 is found the following:

"The most logical statement of the situation is made by saying that recreation stands on a par with other major uses of the Forest areas, and is to be managed on its merits precisely like the others. These major *uses* are:

Timber production.

Grazing.

Watershed protection.

Recreation." (emphasis added)

And at p. 36:

"... historically it appears that National Forests were first created for purposes of recreation, and that this use is traditional."

Ignoring the report's obvious confusion over the difference between "purpose" and "use," this report cannot be interpreted to imply a Congressional intent in favor of broad forest purposes. First, such an interpretation would be contrary to the consistent administrative construction of the Organic Act which adheres to the statement of purposes found in 16 U.S.C. §475. Even if a valid administrative construction, this isolated example cannot be implied to supersede other constructions without affirmative evidence that it was intended to do so.

Second, the study from which these quotes were taken was not prepared by the Forest Service. Though it was

commissioned by the service, it was the work of a landscape architect who was not an administrator charged with execution of the Organic Act. Since legislative intent can be gleaned only from statements of those so charged, the comments of Mr. Waugh cannot be considered to represent the will of Congress in any way.

Finally, the Master-Referee cannot be bound by a construction of an administrator charged with the execution of an act when that construction is shown to be improper by other more persuasive evidence. *United States v. Dickerson*, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L. Ed. 1356 (1940). To obey an erroneous administrative construction which expands the limits of a Congressional enactment would be tantamount to permitting the administrator to legislate. Here the words of the Act itself, the clear statutory history, and other interpretations by actual Forest Service administrators all indicate that the conclusion that the forests were created for a recreational purpose is unsupportable. In light of such persuasive evidence, the Master-Referee cannot conclude that the cited language reflects a Congressional intent to establish broader purposes than those of 16 U.S.C. §475.

The Master-Referee concludes that the administrative interpretation of the purposes of the Organic Act are consistent with his own. Recreation has been recognized to be a lawful, regulable forest *use* by the Forest Service. To permit from this the illogical presumption that recreation must therefore be a forest *purpose* would contravene the statute.

(iii) *Appropriations by Congress.*

The United States has cited to the Master-Referee

numerous appropriations by Congress which provide the Forest Service with financing for various recreational, scenic, wildlife and fish, and related *uses* of the forest. It has also cited numerous substantive provisions of Congressional appropriation acts which provide the Forest Service with power to implement certain recreationally-related *uses* on the national forests. The United States contends that these demonstrate that it was the intent of Congress that recreationally-related *purposes* were to be included within the Organic Act of 1897. The Master-Referee has examined the authority set forth by the government and is of the opinion that no such Congressional intent is evidenced thereby.

It is settled that repeated Congressional appropriations made with knowledge of an administrative construction of an existing law which affirms that construction may be considered as ratification of the administrative action by Congress. *Brooks, v. DeWar*, 313 U.S. 354, 61 Sup. Ct. 979, 85 L. Ed. 1399 (1941); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 Sup. Ct. 1129, 91 L. Ed. 1375 (1947). The United States contends that Congressional appropriations for recreationally-related uses on the forests affirm the construction of Forest Service administrators that the Organic Act provides that the forests were established, *inter alia*, for recreationally-related pur-

First, it should be noted that the Master-Referee has already examined the numerous administrative constructions of the Organic Act cited to him in this matter and found that they show no administrative constructions of the Organic Act cited to him in this matter and found that they show no administrative interpretation that the forests were established for recreational, scenic, or

other related *purposes*. Rather, they clearly show that the Forest Service recognized the limited forest *purposes* but, in accordance with the will of Congress, permitted proper and lawful *uses* of the forest. The Master-Referee is of the opinion that Congressional appropriations for recreationally-related uses do nothing more than confirm such administrative construction.

The United States cites three specific instances of Congressional appropriations. They are a 1908 appropriation providing funds specifically for the protection of game and fish on the forests, 35 Stat. 1039, 1048, U.S. Ex. E-8, a 1922 appropriation funding the construction of sanitary facilities and fire prevention measures on public campgrounds, 42 Stat. 507, 520, and a 1928 appropriation for investigation of forest wildlife, 45 Stat. 699, 701. None of these appropriations affirmatively express in the language used any Congressional desire or mandate that recreationally-related *purposes* be considered inherent in the Organic Act. Neither can the Master-Referee conclude that Congress intended to affirm any such administrative construction. Indeed, if anything, the appropriation acts confirm the above-stated conclusion of the Master-Referee. Under 16 U.S.C. §475, the purposes of the national forests are limited. Under 16 U.S.C. §478, however, all proper and lawful uses may be made of the national forests, subject to administrative regulation under 16 U.S.C. §551. By appropriating funds for various recreational and wildlife uses, Congress was not doing anything more than confirming the *use* of the forests for recreational purposes. It was clearly not stating that the forests were established for recreational purposes. Indeed, the 1922 appropriation for sanitary facilities and fire prevention measures at campgrounds indicates a Congressional

recognition that the forests must be protected in order that the timber and watershed not be damaged. Thus, it is extremely interesting to note that the 1922 appropriation cited by the government authorized only \$10,000 for campground facilities, while at the same time authorizing \$250,000 for fire fighting, \$350,000 for timber testing, \$100,000 for timber appraisals, \$370,000 for developing uses for forest products, and \$125,000 for tree planting. 42 Stat. 519-521. The Master-Referee must conclude that no expanded forest purposes are indicated by the various forest appropriations.

Apart from the actual monetary appropriations, the government has cited various substantive provisions of appropriation bills which deal with the general topic of recreation-related forest uses. That the Congress may effectively legislate by amendments to appropriation bills is settled. *United States v. Dickerson*, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L. Ed. 1356 (1940); *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973). The United States contends that these enactments indicate that Congress provided that the forests had a recreational purpose long before the Multiple Use Act of 1960.

Five specific enactments are cited by the United States. They included:

1. Act of February 28, 1889, 30 Stat. 908, providing the Secretary of Interior with power to lease space adjacent to forest reserve hot springs.
2. An appropriation act of 1899 requiring forest agents to aid in enforcement of state fish and game laws.
3. Act of March 4, 1915, 38 Stat. 1101, codified in pertinent part at 16 U.S.C. §497, authorizing the Secretary of Agriculture to permit

hotels and similar facilities, desirable for recreation.

4. Act of June 7, 1924, 43 Stat. 655, codified in pertinent part at 16 U.S.C. §515, authorizing the Secretary to locate lands chiefly valuable for stream flow or timber production.
5. Act of March 29, 1944, authorizing the Secretaries of Agriculture and Interior to cooperate to secure stream flow, soil erosion prevention, and wildlife benefits.

The Master-Referee is of the opinion that none of these established recreation, scenic, wildlife, or aesthetic purposes of the national forests under the Organic Act.

Once again, it should be noted that none of the enactments cited by the United States indicates in any way that Congress intended to broaden the limited purposes of the national forests as found in the Organic Act. All deal with recreation as a legitimate forest use but none express any Congressional opinion or mandate that recreation be included as a *purpose*. At the risk of repeating himself, the Master-Referee notes that this is entirely consistent with the Organic Act, its legislative history, and administrative construction. Closer analysis of the Acts shows this interpretation of the cited acts to be compelling.

For example, while the Act of June 7, 1924, does indeed authorize location of lands valuable for stream flow, Congress did not have recreational purposes in mind. The Act specifically provides, at 16 U.S.C. §515, that stream flow importance is linked to water flows for *navigation and irrigation or production of timber*. That secondary recreational benefits would inure is not denied, but that these were the purpose of the stream flow protection is simply unfounded.

The Act of March 4, 1915, also clearly permits recrea-

tional uses on the forests. But, as an appropriation act, it also provides \$150,000 for forest fire prevention and fighting, \$140,000 for timber testing, and \$165,000 for experimental tree planting — in recognition of the actual purposes of the forest.

The other enactments cited do not support the government's contentions. For example, assisting in the enforcement of local game laws in no way can be implied to create a forest recreation purpose. In short, the enactments simply recognize, often to a limited extent, the legitimacy of recreation as a forest use under 16 U.S.C. §478 and perhaps confirm administrative interpretations allowing such use under that section. To attribute more meaning to these enactments necessitates the equating of the approval of *use* with the establishment of a *purpose*.

(iv) *Other Information.*

The United States has cited a great deal of other matter, all of which is dated prior to the enactment of the Creative Act in 1891, which it contends demonstrates that the nation's forests were used for recreational purposes long before they were withdrawn as forest reserves. It is not precisely clear how these documents and materials relate to either the Organic Act of 1897 or the Creative Act of 1891. The Master-Referee is of the opinion, however, that they may be taken to represent the history of the times, utilization of which is a proper tool of statutory interpretation. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 62 Sup. Ct. 529, 86 L. Ed. 836 (1942). Since the documents and materials relate exclusively to Colorado and although the Organic Act established a forest policy for the entire nation, they may be of very dubious value in interpreting the Act. They can probably be considered fairly representative of a national attitude, however, and will thus be considered by the Master-Referee.

The United States has cited *The Report of the Commissioner of the General Land Office for the Territory of Colorado* for the years 1873 and 1874. These reports speak in glowing terms of the recreational opportunities available in Colorado in general and not just within its forest areas. Also cited is the 1879 edition of the *Sportsman Guide and Gazeteer* which similarly describes the opportunities for fishing and hunting in the state in general. More closely related to the concerns at hand are the comments of the state forest commissioner which, in 1890, concerned with the continuing destruction of the state's forest areas, suggested the reservation of certain forest lands. Such lands were said to "... abound in fish and wild game ...". These documents do indeed express an appreciation of the recreational opportunities in the state as a whole.

Other statements cited by the objectors demonstrate a concern with saving the forests from destruction in order to preserve the timber supply and the watershed for downstream irrigators. For example, in 1887 the Colorado General Assembly called for the reservation of lands surrounding streams above 10,000 feet to protect the water supply for irrigation. Senate Joint Memorial No. 5, 6th Sess., Jan. 5, 1887 (U.S. Ex. B-26). The Fifth Biennial Report of the Colorado State Engineer notes the importance of proper forest maintenance for preserving water supplies. U.S. Ex. B-21. The Ninth Report of the State Engineer exhibits similar concerns. Biennial Report of the State Engineer, 1897-98 (U.S. Ex. B-22). The Colorado state forest commissioner held the same concerns and in his reports for 1885-1890 elaborated on Colorado's dependence on its forests for timber and irrigation water. Report of the State Forest Commissioner, 1885, 1886, 1887, 1888, 1889, 1890 (U.S. Ex. B-6 through B-9). The general public was also aware of this important forest function. The *Weekly Gazeteer* for September 16, 1884, describes the importance of preserving the forests in order

to maintain a supply of water for irrigation. (U.S. Ex. B-11).

The Master-Referee is of the opinion that these citations, while helpful from an historical viewpoint, cannot be considered to be conclusive. If anything, they show that the public and others were aware of the specific value of the forested areas of the state for timber supply and watershed protection for irrigation, and the opportunities for recreation and sporting activities in the state generally. As such, they tend to support the conclusion of the Master-Referee that the national forests were created specifically and solely for the purposes set forth in 16 U.S.C. §475. Recreational opportunities, though naturally enhanced by their creation, were not a purpose of the forests as such, but merely a lawful use under 16 U.S.C. §78. Even if the historical material cited by the United States could be read to show that the public and others had urged the creation of national forests for recreationally-related purposes, they could not be held to vary the clear expressions of Congressional intent found on the face of the Organic Act and in its legislative history. The Master-Referee is of the opinion that the historical matter cited by the United States illustrates no intent on the part of Congress that the national forests be established for the purpose of recreation and related purposes.

(v) *Judicial Interpretation of the Organic Act.*

The United States has cited several cases which it claims support its contention that various agency-sponsored uses have been judicially affirmed as valid forest purposes. The Master-Referee has examined each of these cases as well as several others and concludes that none of them indicate

that the forests were established for any but the limited purposes of watershed protection and timber preservation.

Two of the cases cited by the United States have already been discussed by the Master-Referee in relation to his interpretation of 16 U.S.C. §551. See Memorandum Opinion §V.C.1.d.(2)(b), *supra*. It would be well to comment on these again briefly at this time. In *Grimaud v. United States*, 220 U.S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563 (1911), the issue was the propriety of the Secretary of Agriculture's regulation of grazing on the national forests. As noted above, the Court expressly recognized the *limited* purposes for which the forests were established under the Organic Act, quoting 16 U.S.C. §475. The Court then went on to state that the Secretary's regulations were essential lest grazing "... interfere seriously with the accomplishment of the purposes for which they [the national forests] were established." Grazing was no more than a permissible forest use, but only to the extent that it did not impair the forest purposes. In further support, see also *Light v. United States*, 220 U.S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1911), a companion case to *Grimaud*.

The government contends that *United States v. Hunt*, 19 F.2d 634 (D. Ariz. 1927), gives judicial sanction to hunting as a valid purpose of the national forests. This case is also fully treated in §V.C.1.d.(2)(b) of this Memorandum Opinion. Briefly, the issue in *Hunt* was whether the Forest Service could permit hunting on the Kaibab National Forests in contravention of Arizona's game laws. The District Court for Arizona agreed that it could. Its decision was based solely on the fact the deer and other game were eating young trees and thus contributing to the destruction of the forest. To preserve the forest, the Secretary could permit hunting even if in violation of

Arizona's game laws. The case said nothing about the validity of hunting on the forest simply for recreative purposes. Hunting was permitted solely to preserve the forest from destruction in order that its united purposes could be achieved.

The government cites two cases which deal with skiing uses of the national forests, *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), aff'd 405 U.S. 727, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972), and *Heath v. Aspen Skiing Corp.*, 325 F. Supp. 223 (D. Colo. 1971).

In *Heath*, the issue was whether an individual not permitted to do so by the Aspen Corporation could teach skiing at a facility which was licensed by the Forest Service. The District Court for Colorado held that he could not. The case did not address or even mention the issue of whether the ski area itself was somehow established in furtherance of the forest purposes. Indeed, the existence of the ski area bore no relation to the case except for the fact that it was the place of the controversy between the litigants. The case is not in point and is not authority here. In *Sierra Club*, the issue was the propriety of the permit which the Secretary of Agriculture had granted for the development of a ski area in the Mineral King Valley of California. Though it found the plaintiffs to be without standing, the Court did discuss the merits of the controversy. The immediate question was whether the Secretary was authorized to issue revocable permits and, if so, whether combined term and revocable permits were valid. In discussing the question the Court said at p. 35:

"The fact that the record discloses that there

are now a total of at least eight-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality. Many of these developments are ski developments making use of the maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres." (footnote omitted)

This was as close as the Court came to discussing whether skiing was a valid purpose of the forest. This comment, made while the Court was discussing an entirely separate issue, is no authority for the contentions of the government. If anything, the comment simply shows skiing to be a lawful forest use, to be permitted when not in contravention of forest purposes. In any case, it must be noted that this case, as well as *Heath*, was decided after the enactment of the Multiple-Use Act of 1960 which did in fact make recreation a purpose of the national forests.

The final case cited by the government also fails to support the contentions of the government. In *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965), defendants were convicted of riding motorcycles in a primitive area established by the Secretary of Agriculture within the Boise National Forest and fined \$100 each under 16 U.S.C. §551. Motorcycle riding within the primitive area was prohibited by regulations adopted under that section. Defendants challenged the validity of the regulations,

stating that, since they were not designed to protect the forests from destruction, they were beyond the authority of the Secretary to adopt. The court upheld the regulations on the theory that the Secretary's authority to regulate occupancy and use of the forests was not confined to regulations necessary to preserve the forests from destruction. The Master-Referee has recognized and discussed this concept above. See Memorandum Opinion §V.C.1.d.(2)(b), *supra*. The Court did not, however, say anything which would indicate that recreation was somehow made a purpose of the forest because it was a lawful, regulable forest use. Instead, the Court recognized that administrative interpretation of the Organic Act has always considered recreation to be no more than a legitimate *use*:

"The consistent administrative interpretation of section 551, however, has been that while recreational considerations alone will not support the establishment of a national forest, they are appropriate subjects for regulation." p. 285.

While finding the primitive area to constitute a lawful forest use, the Court's decision cannot be interpreted to support the contention that recreation was a purpose for which the Organic Act permitted the forests to be established. Consequently, *McMichael* cannot be interpreted to stand for the proposition that recreation is a valid forest purpose under the Organic Act.

The Master-Referee concludes that judicial interpretations of the Organic Act do not support the proposition that the national forests could be established thereunder for any but timber and watershed protection purposes. In

further support of this conclusion, the Master-Referee refers the reader to §V.C.1.d.(2)(b) of this Memorandum Opinion and the discussion of *United States v. Johnston*, 38 F. Supp. 4 (S.D.W.Va 1941), and *United States v. Shannon*, 151 Fed. 863 (D. Mont. 1907) therein. See also *Honchok v. Hardin*, 326 F. Supp. 988 (D. Md. 1971).

(e) *The Multiple-Use Sustained-Yield Act of 1960: 74 Stat. 215 (1960).*

The United States also cites various provisions of the Multiple-Use Sustained-Yield Act [hereinafter Multiple Use Act] of 1960, as well as legislative history thereof, in order to support its contention that recreational purposes were inherent in the Organic Act of 1897. Since subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject, *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 62 Sup. Ct. 529, 86 L. Ed. 836 (1942); *Tiger v. Western Investment Co.*, 221 U.S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738 (1911), the Master-Referee must examine the Multiple Use Act in light of the government's assertions.

(i) *Effect of the Multiple Use Act of 1960 on the Organic Act of 1897.*

The United States contends that the Multiple Use Act and its legislative history indicate that the purposes of the Organic Act included various recreationally-related forest purposes. It contends that the Act stands as a "reaffirmation and codification," (United States Reply Brief, p. 20) of an administrative policy of the Secretary of Agriculture which treated the national forests as if such purposes existed on the basis of the Organic Act. This reaffirmation, it contends, shows that Congress intended recreationally-related purposes to be included within the Organic Act of 1897. The Master-Referee is of the opinion that neither the

Multiple Use Act or its legislative history indicates that Congress intended the Organic Act to have any but the purposes of the forest improvement, timber preservation, and watershed protection.

At this point, the Master-Referee must reiterate that the materials submitted to him for his interpretation and review do not indicate that there ever existed any administrative policy within the Forest Service which declared recreation or related *purposes* to be inherent in the Organic Act. These materials, as well as numerous others, have been examined and fully discussed in other sections of this opinion. They show only that the consistent administrative and judicial interpretation of the Organic Act considered recreation and related *uses* to be lawful and regulable uses of the forests. No administrative or judicial sanction has even been given to the concept that the Organic Act encompasses recreation as a forest purpose. There is therefore no basis upon which to argue that the Multiple Use Act merely reaffirms and codifies an administrative policy which so treated recreation.

Apart from this, the Multiple Use Act and its legislative history show that Congress intended the Act to *expand* the previously limited purposes stated in the Organic Act, rather than to be a retroactive reaffirmation of purposes inherent therein. In pertinent part, as now codified at 16 U.S.C. §528, the Multiple Use Act states:

"It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 and 531 of this Title are declared to be *supplemental* to, but *not in derogation of*, the

purposes for which the national forests were established as set forth in section 475 of this title." (emphasis supplied)

The underscored language in the preceding citation recognizes that the Multiple Use Act was intended to establish new and additional purposes for the forests as of the date of its enactment in 1960. In light of its express statement that the purposes which it establishes are supplemental to those of the Organic Act, the Act cannot be read as declaratory of a pre-existing Congressional policy. This being so, the Master-Referee concludes that outdoor recreation, range, and wildlife and fish purposes have existed as national forest purposes only since the enactment of the Multiple Use Act.

This conclusion is further supported by the legislative history of the Multiple Use Act. The report of the House Committee specifically addresses the language set forth above. In describing how forests now could be established under the 1960 Act, it states:

"The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897. *Thus, in any establishment of a national forest a purpose set out in the 1897 act*

must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest [under the 1960 Act] if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act." House Report No. 1551 or House Report 10572, April 25, 1960, 86th Cong. 2nd Sess., p. 4. (emphasis supplied)

The committee report is highly conclusive of what Congress intended by the Multiple Use Act. It expressly recognizes the limited purposes of the Organic Act and states that the new purposes set out in the Multiple Use Act are "additional." They did not exist under the terms of the Organic Act. Indeed, it is interesting to note that, even after 1960, recreationally-related purposes alone will not support the establishment of a national forest. At least one of the purposes of the Organic Act must be present to justify national forest establishment.

The committee report also recognizes that under the Organic Act recreation was merely a lawful and regulable use of the national forests. A letter from E. L. Peterson, Acting Secretary of the Department of Agriculture, which was included in the report, states in part:

"The authority to administer recreation and wildlife habitat resources of the national

forests has been recognized in numerous appropriation acts and comes from the authority contained in the act of June 4, 1897, to regulate the 'occupancy and use' of the national forests." *Id.*

The Master-Referee is of the opinion that the Multiple Use Act and its legislative history clearly indicate that the only forest purposes established by the Organic Act are those stated in 16 U.S.C. §475. In 1960 these purposes were expanded in accord with the dictate of the Multiple Use Act as stated in 16 U.S.C. §528.

(ii) *The Multiple Use Act in This Litigation.*

The conclusion of the Master-Referee that neither the Multiple Use Act nor its legislative history can be read as an expansion of the limited purposes of the Organic Act does not conclude the 1960 Act's role in this case. Like the Organic Act before it, the Multiple Use Act establishes certain purposes for the national forests. The Organic Act permits the establishment of the forests for the purpose of improving and protecting the forest, for securing favorable conditions of water flows, and to furnish a continuous timber supply. To this list, the Multiple Use Act adds outdoor recreation, range, and fish and wildlife purposes, though the legislative history cited above makes it clear that a forest cannot be established for one of the newer purposes only. A purpose stated in the Organic Act must also be present.

It should be noted that the purposes stated in the Multiple Use Act do not apply only to forests established after the date of its enactment. The language of the Act and the legislative history indicate that its purposes attach to forests existing as of that date as well. As the Act states:

"It is the policy of the Congress that the national forests *are* established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. §528. (emphasis supplied)

The use of the word "are" in this first sentence of 16 U.S.C. §528 indicates that the purposes of the Multiple Use Act were intended by Congress to attach to existing forests as well as those created after passage of the Act. The legislative history of the Act also is helpful on this point. It indicates that the basic function of the Multiple Use Act was to provide direction to the Secretary of Agriculture to administer forests on a multiple use and sustained yield basis. House Report No. 1551 or House Report No. 10572, April 25, 1960, 86th Cong., 2nd Sess., p. 1. Nowhere does the report indicate that the directive was to apply only to future forests. Indeed, its language clearly shows that the directive covered all forests — existing and future — as of the date of the Act. *Id. passim*. To hold otherwise would thwart the clear intent of the Act, just as to hold that the Act is somehow retroactive would impermissibly expand its scope. *Id.*, p. 4.

The importance of the foregoing to this litigation, of course, relates to the need for water to achieve the purposes of the Multiple Use Act. Under the reservation doctrine, unappropriated water is reserved to accomplish the purposes of a reservation. On June 12, 1960, the Multiple Use Act broadened the purposes of the national forests. Consequently, as of that date, reserved water could be utilized in sufficient amounts to satisfy the outdoor recreation, range, and fish and wildlife purposes of the national forests, provided sufficient unappropriated water was

available. Prior to that date, reserved water could be utilized only to achieve the Organic Act's purposes of improving and protecting the forest, watershed protection, and timber preservation and supply.

e. *Minimum Stream Flows and Lake Levels.*

A question of great importance in this litigation is whether the United States may be granted the right to utilize reserved waters to maintain minimum stream flows and lake levels for streams and lakes within the national forests. Since reserved water may be utilized only as is necessary to accomplish the purposes for which a particular reservation was created, water to maintain minimum stream and lake levels may be granted under the reservation doctrine only if it will further some established national forest purpose. The United States in its claims, briefs, and oral arguments has attempted to demonstrate that minimum stream flows and lake levels are cognizable under three basic forest purposes. They are:

1. The purpose of "... securing favorable conditions of water flows ..." expressed in the Organic Act of 1897, 16 U.S.C. §475.
2. The purpose of "... outdoor recreation ..." expressed in the Multiple Use Act of 1960, 16 U.S.C. §528.
3. The purpose of "... wildlife and fish ..." expressed in the Multiple Use Act of 1960, 16 U.S.C. §528.

The Master-Referee is of the opinion that minimum stream flows and lake levels are cognizable only under the

forest purposes of outdoor recreation and wildlife and fish. Since these were not forest purposes prior to the enactment of the Multiple Use Act of 1960, the United States is not entitled to utilize water to accomplish them pursuant to the reservation doctrine except under priorities as of and subsequent to June 12, 1960, the date of the Act. Consequently, no claim for minimum stream flows and lake levels predating June 12, 1960, will be recognized by the Master-Referee.

(1) "*Minimum*" v. "*Adequate*" v. "*Appropriate*" Stream Flows and Lake Levels.

There exists some confusion in this action regarding whether the United States seeks *minimum*, *adequate*, or *appropriate* stream flows and lake levels on the national forests. Before deciding whether reserved water may be utilized for the maintenance of any stream and lake levels on the national forests, the Master-Referee will attempt to resolve the confusion regarding this matter.

In its statements of claim and applications for the use of reserved water on the national forests, the United States clearly claimed *minimum* stream flows and lake levels for the forests. No other term was used to describe the sought in-place uses.

In contrast, at the oral arguments, government counsel clearly attempted to distinguish the terms "*adequate*" and "*minimum*" and to argue that the United States was seeking "*adequate*" in-place uses. See Argument of Mr. Meshorer, Tr., Dec. 6, 1974, pp. 277-278. See also Reply Brief of United States, at, for example, p. 4, and Proposed Findings of Fact, Conclusions of Law and Decree of the United States at, for example, p. 72. At that portion of the

evidentiary hearing regarding water uses on the national forest, the government witness spoke in terms of neither minimum nor adequate in-place uses. Rather, he preferred the term "*appropriate*." See, for example, Tr., Dec. 12, 1972, pp. 121-122; Dec. 13, 1972, pp. 18, 56; Dec. 14, 1972, p. 57. The witness did state that he preferred that term since he felt the term "*minimum*" was often connected simply with flows necessary for fish preservation, while the United States was seeking broader in-place uses. It is evident from this brief review that the precise nature of the water use which the government seeks has become somewhat clouded. The Master-Referee is of the opinion that he should grant, if at all, reserved rights for "*minimum*" in-place uses as claimed by the United States.

The statements of claim and applications of the United States must set the standards upon which this litigation is based. In these statements and applications, the United States explicitly claimed *minimum* in-place uses for the national forests. Naturally, a statement of claim or application may be amended, but that does not appear to be the case here. No oral or written amendment was ever offered. At trial, certain statements were made by the government witness that he preferred the term "*appropriate*" in relation to the in-place uses. These statements cannot be considered to have changed the government's position in any way. Except to say that he feared that the term "*minimum*" was often connected only with in-place uses for fish, a limited view understood by the Master-Referee not to represent fully the government's claims (see the United States' Statements of Claim and Applications for the National Forests Herein), the witness did not

demonstrate how the term "appropriate" differed from "minimum." Neither has the government shown how the term "adequate" differs from either "minimum" or "appropriate." Indeed, the government witness himself noted that the terms really mean little, if anything, until an amount is associated with them. As he said:

"... I think the claims talk in terms of 'minimum.' I have been talking in terms of 'appropriate,' and all this sort of thing.

"Now you can't really talk in terms of 'minimum' or 'appropriate' unless you can hang a number on it so the people know what you are talking about, and that is quantification." Tr., Dec. 14, 1972, p. 57.

The government has requested, and has been granted herein, the opportunity to quantify those reserved right claims which may be granted in this proceeding. This will include the various in-place uses. At that time, when all the evidence is before the proper court, the precise meaning of "minimum" can be determined in light of the purposes of the national forests. At this point in the litigation, however, the Master-Referee is of the opinion that the United States must be limited to the terms of its statements of claim and applications and be granted, if any, "minimum" stream flows and lake levels. No formal amendment was offered and no evidence was presented which would justify an amendment to the statements of claim and applications.

(2) *Scope of Organic Act Purpose of "... securing favorable conditions of water flows ...":*
16 U.S.C. §475.

As stated above, the Master-Referee has concluded that minimum stream flows and lake levels may not be granted to fulfill the forest purpose, as stated in the Organic Act, of "... securing favorable conditions of water flows ..." The Master-Referee is of the opinion that the Organic Act and its legislative history clearly indicate that this purpose comprehends that the forests be reserved to protect its watershed qualities in order to make available increased water supplies for off-the-forest users. Permitting on-forest minimum flows and lake levels may well be inconsistent with the fulfillment of the above-stated purpose.

The Organic Act itself makes it clear that enhanced water supplies created by the reservation and protection of the forests were to be available for use by appropriators. According to the Act, as now codified at 16 U.S.C. §481:

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The very terms of this section indicate that "all" waters provided by the national forests were to be available for utilization by appropriators for various purposes. Indeed, the Forest Service has followed this dictate by granting to appropriators rights-of-way across forest lands under, among others, the Act of March 3, 1891, codified in perti-

nent part at 43 U.S.C. §946 *et seq.*, the Act of February 15, 1901, 43 U.S.C. §959, and the Act of February 1, 1905, codified in pertinent part at 16 U.S.C. §524. These rights-of-way provisions have allowed appropriators to enter and take water from the forests in fulfillment of various off-the-forest needs. This is in conformity with the terms of the Organic Act. To say that the utilization of reserved waters to maintain minimum stream flows and lake levels would somehow fulfill the purposes of the forests as stated in the Organic Act would truly be illogical and inconsistent with their purposes.

The legislative history of the Organic Act also supports the conclusion that in-stream uses would be inconsistent with the watershed protection purposes of the national forests. Although already discussed in §V.C.1.d.(2)(d)(i), *supra*, the legislative history of the Act bears some repeating.

Rep. McRae of Arkansas, a chief sponsor of the Organic Act, was one of those who believed that the forests were to supply water to off-the-forest users. As he said:

"Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so that they will not rush to the streams in torrents in the spring and early summer. We all know that in a well timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

"As long as the forests stand, the branches,

the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts. . . .

"The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe, and preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these forest reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.

"It is therefore necessary to prescribe the manner and method by which the timber growing thereon, and mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established." 30 Cong. Rec., p. 966. (emphasis supplied)

The representative from Arkansas was aware of the importance of forest land in protecting the watershed and urged the creation of forests for the purpose of their protection. The reason for this is made clear in his statement that the forests would ". . . furnish water not only for the navigation of our rivers, but also for the irrigation of the deserts."

Indeed, many Congressmen viewed the essential purpose of the national forest as the protection of watersheds in order to provide water for off-forest users. Rep. Ellis of Oregon stated:

"They [the people of the West] believe in setting apart reasonable reservations near the headwaters of the streams, if you please, especially such as afford water supplies to cities, if there be any such . . .

"... as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of his forest reservations is not to save the timber for future use so much as to preserve the water supply.

"I take it, Mr. Chairman, that these reservations of forests and setting them apart are for the purpose of preserving the merchantable timber, but that is not the real object, it is for the preservation of the water supply." 30 Cong. Rec., pp. 1006-07. (emphasis supplied)

Rep. Loud from California emphasized the same concept:

"... I want to say further that the only object of the forest reserves in this State of California is to retain the snows upon the mountains, so that the snows and rains of the spring will not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.

"That is the main object of the forest reserves in the State of California . . ." 30 Cong. Rec. at 1399. (emphasis supplied)

The Organic Act and its legislative history indicate that the watershed protection purpose of the national forest was viewed in economic terms. The forests were to be a source of water supply for irrigators, cities, and other appropriators. No change in this philosophy occurred until the passage of the Multiple Use Act of 1960. To permit the use of reserved water to maintain minimum stream flows and lake levels on national forest lands would be inconsistent with the reservation doctrine which permits water to be used only as the use fulfills a valid forest purpose. The Master-Referee concludes that the United States cannot be granted minimum stream flows and lake levels for the national forests under the Organic Act of 1897.

(3) *Scope of Claim Regarding Uses for Stream Flows and Lake Levels.*

Even if the forest purpose of "... securing favorable conditions of water flows . . ." could somehow be interpreted to permit the utilization of the reserved right to maintain minimum stream flows and lake levels, the Master-Referee is of the opinion that such a use could not be granted for the fulfillment of that purpose in this case. The Master-Referee can grant to the United States no more than it has claimed. On the basis of the claims and applications of the United States and the evidence presented purusant thereto, the Master-Referee must conclude that the United States has not *claimed* the right to utilize reserved waters for maintaining minimum stream flows and lake levels pursuant to the forest purpose stated above.

Under the heading "Amount and Uses Claimed," the

statement of claim of the United States for each of the national forests involved herein reads in pertinent part:

"The United States claims direct water rights, storage water rights, transportation rights and well rights for purposes which include, but are not limited to, the following: growth, management and production of a continuous supply of timber; recreation; domestic uses; municipal and administrative-site uses; agriculture and irrigation; stock grazing and watering; the development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent; fire fighting and prevention; forest improvement and protection; commercial, drinking and sanitary uses; road watering; *watershed protection and management and the securing of favorable conditions of water flows*; wilderness preservation; flood, soil and erosion control; preservation of scenic, aesthetic and other public values; and *fish culture, conservation, habitat protection, and management. With respect to the category of fish culture, conservation, habitat protection, and management, the United States claims the right to the maintenance of such continuous, uninterrupted flows of water and such minimum*

stream and lake levels as are sufficient in quantity and quality to:

- "(1) *Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters on the applicable reservation dates, or those species of fish which are thereafter introduced.*
- "(2) *Attain and preserve the recreational, scenic, and aesthetic conditions existing on the applicable reservation dates, or to preserve those conditions which are thereafter caused to exist.*" (emphasis supplied)

The statements of claim indicate that the United States claimed water to fulfill the numerous alleged purposes of the forest as it envisioned them in its claims. Among these purposes were:

1. "Watershed protection and management and the securing of favorable conditions of water flows."
2. "Fish culture, conservation, habitat protection, and management."

The statements of claim also indicate that the United States requested the right to use reserved waters for the maintenance of minimum stream flows and lake levels *only* in relation to the category of "fish culture, conservation, habitat protection and management." It did not claim the right to utilize waters in such a way pursuant to the watershed protection purpose. In addition, the claims indicate that the minimum stream flow and lake level use was considered by the United States to relate only to fish preservation, scenic, recreational, and aesthetic values.

At trial, the United States put on extensive evidence

regarding the various uses of reserved water on the national forests. Its approach was to discuss each of the claimed purposes separately. *See Tr., Dec. 12, 1972, pp. 68-124.* The watershed protection category is discussed at pages 105-109 of the transcript of December 12, 1972. There, on direct examination, the government witness emphasized the importance of the forest in retaining waters throughout the warm seasons and in preventing erosion and flooding. He noted that water would be utilized for seeding and irrigating of areas where timber is damaged and for reestablishing vegetation. He also noted that certain experiments in cloud seeding and lightning prevention, both of which would protect and enhance the watershed, might require the use of reserved waters. Throughout, the witness stressed the importance of the forest as a means of regulating runoff so that water would be available throughout the dry months. Not once did the witness testify that minimum stream flows and lake levels were necessary, under this limited purpose, and certainly not for the achievement of various recreational values.

Only much later, on redirect examination, did the United States attempt to connect minimum stream flows and lake levels to the forest purpose of watershed protection. *See Tr., Dec. 13, 1972, pp. 140-141, 146-147.* The responses of the witness indicate that he was uncertain of how minimum stream flow and lake level uses related to the watershed protection purpose until the answer was suggested by government counsel.

In contrast is the testimony of the government witness regarding the category of fish culture, conservation, habitat protection, and management — the only category to which in-place water uses were related in the government applications and statements of claim. *Tr., Dec. 12, 1972, pp. 115-126.* In this testimony, the witness spoke extensively about the need for in-place uses on the national forests in order to attain and promote various fish,

wildlife, scenic, and aesthetic values in the forests. The witness did not once attempt to relate the claimed in-place uses to the watershed protection purpose at this place in the testimony. Rather, he related the uses to values which can only be subsumed under the recreation and wildlife and fish purposes of the forest dictated by the Multiple Use Act of 1960.

For any use of reserved water to be allowed on the national forests it must relate to a valid forest purpose. The Master-Referee has concluded that these purposes can be found in the Organic Act of 1897 and the Multiple Use Act of 1960 as fully discussed in previous sections. In its statements of claim and applications for reserved rights on the national forests, the United States stated the purposes of the forest far more broadly than is justified by those Acts. It is clear, however, that the United States intended to relate its claims for in-place uses on the national forests *only* to what it called the "purpose" of "fish culture, conservation, habitat protection, and management." In addition, these in-place uses were claimed only to attain certain fish and wildlife, scenic, aesthetic, and recreational values. The claims and evidence show that in-place uses were not claimed or considered to be a part of the purpose of "... securing favorable conditions of water flows ...", which in turn was not (and could not be) shown to be a purpose having recreational aspects which the claimed in-place uses were designed to fulfill. The Master-Referee must conclude that the United States did not claim minimum stream flows and lake levels in connection with the forest purpose of watershed protection. Its claims related such uses to values which can be countenanced under the forest purposes of outdoor recreation and wildlife and fish. As such, the Master-Referee is powerless to award the United States such uses pursuant to the watershed protection purpose of the forest.

(4) *Minimum Stream Flows and Lake Levels Under the Multiple Use Act of 1960: 16 U.S.C. §528.*

Remaining to be addressed is the important question of whether the United States may be granted minimum stream flows and lake levels to effectuate the forest purposes set out in the Multiple Act of 1960, 16 U.S.C. §528.

First, the Master-Referee notes that the United States already has claimed the right to certain in-place uses to fulfill at least two of the purposes of the Multiple Use Act. The United States has claimed and shown that in-place uses on the forest enhance recreational and fish values. Outdoor recreation and fish and wildlife are two purposes of the Multiple Use Act.

The more important question to be answered in regard to in-place uses on the national forests is whether such uses may be granted at all under the reservation doctrine. The Master-Referee is of the opinion that the United States may be granted minimum stream flows and lake levels as are reasonably necessary to fulfill the purposes of the national forests as stated by the Multiple Use Act of 1960, to wit, outdoor recreation and fish and wildlife purposes. Such in-place uses must be quantified as described in this Partial Report.

As long ago as *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899), the Supreme Court recognized the right of the United States "... as the owner of lands bordering on a stream, to the continued flow of its waters, at least as may be necessary for the beneficial uses of the government property." (emphasis supplied). Subsequent decisions of the Supreme Court developed this broad statement into the reservation doctrine. *Winters v. United States*, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); *United States*

v. Powers, 305 U.S. 527, 59 Sup. Ct. 344, 83 L. Ed. 330 (1939); *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 Sup. Ct. 998, 28 L. Ed. 2d 278 (1971). A fundamental precept of that doctrine, at least as it applies to non-Indian federal reservations, is that the United States may utilize unappropriated waters as are reasonably necessary to fulfill the purposes of the reservation. While none of these cases expressly recognized the right of the United States to make in-place water uses under the doctrine, certainly none denied the United States that right. Rather, they created a doctrine which, on its face, was broad enough to encompass such uses so long as they effectuated a valid reservation purpose.

The United States Supreme Court finally settled the issue of whether the reserved right doctrine permits the United States to make in-place uses of reserved water, at least with respect to waters upon national monuments, in *Cappaert v. United States*, _____ U.S. _____ (June 7, 1976) (44 L.W. 4736). In *Cappaert*, the United States claimed a reserved water right to maintain a certain level of water within the Devil's Hole National Monument as was necessary for the continued propagation and survival of the Devil's Hole pupfish. Upon review of the statute and the Presidential Proclamation under which the Monument was created, the Court found that a fundamental purpose of the Monument was the preservation of the pupfish. It therefore granted sufficient water under the reservation doctrine to fulfill that purpose, ordering that pumping from wells of the defendants be limited as

necessary to maintain in Devil's Hole that amount of water needed for preservation of the pupfish.

The Master-Referee is of the opinion that the *Cappaert* decision stands for the principle that in-place uses of reserved water may be made under the reservation doctrine in general when such uses are reasonably necessary to fulfill the purposes of a specific reservation. The reservation doctrine is certainly broad enough to encompass such uses. Indeed, the Master-Referee is of the opinion that the failure to recognize such uses when necessary to fulfill reservation purposes would constitute an erroneous and unauthorized limitation of the doctrine as developed by the United States Supreme Court.

In addition to being lawful under the general reservation doctrine, in-place uses may exist to serve the purposes of the national forests, specifically the outdoor recreation and fish and wildlife purposes of the Multiple Use Act. Since the *Cappaert* case dealt with the national monument, it is not conclusive of this issue. Its reasoning, however, is persuasive. It establishes that in-place uses of reserved water may be made where reservation purposes so require. Here also, the purposes of the reservation, as established by the Multiple Use Act, require that in-place uses of water must be made. Certainly the propagation and protection of fish and wildlife cannot be accomplished if the streams and lakes on the national forest are dried up or reduced to a level at which fish and wildlife cannot survive. Similarly, the dewatering of streams or lakes on national forests is inconsistent with the recreational values inherent in the forest purpose of outdoor recreation. Certain minimum levels of water utilized in-place must be maintained if these forest purposes are to be achieved. As the Master stated in *Arizona v. California* in regard to the Lake Mead Recreational Area:

"Since the purposes of the Recreation Area could not be fully carried out without the use of water from the mainstream of the Colorado River, I have found that the United States intended to reserve such water for use within the Recreation Area." Master's Report at p. 293.

The same logic applies herein. Water is essential to the fulfillment of the forest purposes cited above. That the uses are in-place rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States, as of the date of the Multiple Use Act, intended to reserve water sufficient to fulfill these purposes. In doing so, the Master-Referee is aware of the decision of the District Court for the First Judicial District of the State of Idaho in *Avondale Irrigation District v. North Idaho Properties, Inc.*, No. 22418, December 2, 1975, in which the Idaho court concluded that the national forests were not established to provide minimum flows. The Master-Referee notes that the Idaho court appeared to examine minimum flows in light of the purposes of the Organic Act of 1897, and not the 1960 Multiple Use Act. As a result, the case did not appear to determine the issue of minimum flows under the latter act. To the extent that it may have done so, the Master-Referee must respectfully disagree with the conclusions stated therein.

Although older Colorado case law would indicate that in-stream uses are impermissible and that water may be appropriated in Colorado only by diversions or impoundments and applications to beneficial use, *Colorado River Water Conservation District v. Rocky Mountain Power Company*, 158 Colo. 331, 406 P.2d 798 (1965), recent amendments to the state's Water Right Determination and

Administration Act of 1969 specifically provide for such uses. 1973 Colo. S.L., p. 1521, §1. For example, the term "diversion" now includes "controlling water in its natural course or location." §37-92-103(7), C.R.S. 1973. In addition, the definition of "beneficial use" now includes the following sentence:

"For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." §37-92-103(4), C.R.S. 1973.

It would be strange, indeed, if citizens of this state and the state itself were allowed to appropriate water for in-place uses while the federal government is denied the right to do so under the reservation doctrine.

Since the concept of in-place uses has now been accepted in Colorado and since such uses fall within the broad ambit of the reservation doctrine and the specific purposes of the national forests under the Multiple Use Act of 1960, the Master-Referee concludes that the United States is entitled to a reserved right for such uses with a priority date no earlier than June 12, 1960, subject to quantification in accordance with the first sentence of §37-92-103(4), C.R.S. 1973.

f. *Effect of 16 U.S.C. §481.*

The objectors have contended that certain uses made of waters flowing within the national forests must be superior

to any reserved rights which the United States may be found to possess in this proceeding. They base their contention on the provisions of 16 U.S.C. §481, originally enacted by Congress as a part of the Organic Act, 30 Stat. 36 (1897). That section reads:

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

The objectors argue that this section makes available for use, whether on the reservation or off, all national forest waters which are employed under Colorado law for the specific purposes enumerated therein. Since §481, *supra*, is clear on its face, since the Multiple Use Act of 1960 left §481 undisturbed, and since no legislative history for either the Organic Act or the Multiple Use Act has been discovered by the Master-Referee which would disclose any contrary Congressional intent, the Master-Referee is of the opinion that the contentions of the objectors are correct and that United States' reserved rights on the various national forests must be subject to Colorado water rights for domestic, mining, milling, or irrigation purposes whether such rights bear priority dates before or after the date of reservation of the waters appurtenant to the national forests.

g. *Water Uses Which May Be Made to Fulfill the Purposes of the National Forests Involved Herein.*

As described below, various types of water uses may be

made of reserved waters to fulfill the purposes for which the national forests were created. *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v. California*, 375 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). No use may be allowed, however, unless it does in fact fulfill a valid purpose of the national forests as set out in the preceding analysis. This is a particular problem in the case of the national forests, since the purposes for which they are established accrued under different statutes at far different dates. As a result the following is true:

1. Reserved water may be utilized under the Creative Act of 1891 and the Organic Act of 1897 to fulfill the following purposes:
 - a. To improve and protect the forest,
 - b. To secure favorable conditions of water flows,
 - c. To furnish a continuous supply of timber.
2. As of June 12, 1960, reserved water may be utilized under the Multiple Use Act of 1960 to fulfill the above-stated purposes, as well as the following:
 - a. Range,
 - b. Outdoor recreation,
 - c. Wildlife and fish.

In accord with this limitation, the Master-Referee is of the opinion that the United States has demonstrated that reserved waters may be employed on each of the national forests in quantities, as shall be determined in accord with this report, sufficient to fulfill their purposes.

- (1) *Uses Permissible Under the Creative Act of 1891 and the Organic Act of 1897.*

The following specific uses may be made pursuant to the reserved right for national forests in accordance with the general purposes of the forests under the Creative Act of 1891 and the Organic Act of 1897:

1. Growth, management, timber, and production uses, including but not limited to irrigation of trees, nurseries, cone orchards, and seed production areas. Tr. Dec. 12, 1972, pp. 68-77.
2. Domestic uses, including but not limited to domestic uses at Forest Service administrative-site facilities. *Id.*, pp. 80-82.
3. Municipal uses, including but not limited to fire protection and prevention, lawn watering at forest service administrative sites. *Id.*, pp. 82-84.
4. Administrative-site uses, including but not limited to lawn watering at ranger stations and other administrative sites, care of Forest Service equipment, personal uses of Forest Service employees at ranger stations and other administrative sites, watering of Forest Service horses at other forest service administrative sites. *Id.*, pp. 84-85.
5. Agriculture and irrigation uses, including but not limited to irrigation of hay for forest service horses, provided that no reserved water is used to irrigate meadows and range land used by permittees, lessees, or other persons using forest land by permission or consent of the Forest Service, and provided further that no reserved water is used to irrigate feed of any sort for use by wildlife. *Id.*, pp. 85-87.
6. Stock grazing and watering uses, including but

not limited to watering uses for Forest Service horses provided that no reserved water is used for stock grazing and watering of stock belonging to persons using forest lands as permittees, lessees, or under any other form of forest service permission. *Id.*, pp. 91-95.

7. Fire fighting and prevention uses, including but not limited to uses for fighting and prevention of land fires or structure fires within forest lands. *Id.*, pp. 96-98.
8. Forest improvement and protection uses, including but not limited to tree planting uses, tree spraying, control of managed fires, irrigation of reseeded species of trees. *Id.*, pp. 98-102.
9. Drinking and sanitary uses, including but not limited to drinking and sanitary uses at Forest Service and other administrative sites. *Id.*, pp. 102-104.
10. Road watering uses, including but not limited to watering of roads during road construction, watering of roads to prevent wind erosion thereof, revegetation of road cuts. *Id.*, pp. 104-105.
11. Watershed protection and management and the securing of favorable conditions of water flow uses, including but not limited to uses for prevention of soil erosion, flood control, irrigation and restoration of areas damaged or denuded by forest fires and other phenomena. *Id.*, pp. 105-109.

(2) *Uses Permissible Under the Multiple Use Act of 1960.*

The following specific uses, as well as the uses listed

above, may be made pursuant to the reserved right for national forests in accordance with the general purposes of the forests under the Multiple Use Act of 1960:

1. Recreational uses, including but not limited to uses for national forest campgrounds, picnic areas, organization sites, and other Forest Service recreational facilities, provided that no reserved water is utilized by any permittee, lessee, or other person operating any facility on the national forest under any form of Forest Service permission. *Id.*, pp. 77-80.
2. Agriculture and irrigation uses, including but limited to irrigation of wildlife feed such as corn and millet, provided that no reserved water is used by permittees, lessees, or other persons using forest land by permission or consent of the Forest Service, irrigation of experimental forage under study by the Forest Service. *Id.*, pp. 85-88.
3. Uses for the development, conservation, and management of migratory wildlife and wildlife resources, including but not limited to watering of wildlife, diversions and impoundments for maintenance of fish life. *Id.*, pp. 88-91.
4. Stock grazing and watering uses, including but not limited to irrigation for enhancing and improving range forage, provided that no reserved water is used by permittees, lessees, or other persons using national forest land under Forest Service consent or permission. *Id.*, pp. 91-95.
5. Wilderness preservation uses, including but not limited to fighting and prevention of forest fires. *Id.*, pp. 109-111.

6. Uses for preservation of scenic, aesthetic, and other public values, including but not limited to campground facilities. *Id.*, pp. 111-114.
7. Uses for fish culture, conservation, habitat protection and management, including but not limited to the attainment and maintenance of minimum stream flows and lake levels as are necessary to:
 - a. Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters as of June 12, 1960, the effective date of the Multiple Use Act of 1960, or the applicable reservation date, whichever is later. *Id.*, pp. 115-125.
 - b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the national forests as of June 12, 1960, the effective date of the Multiple Use Act of 1960, or the applicable reservation date, whichever is later. *Id.*, pp. 115-125.

2. *Purposes of Rocky Mountain National Park.*

The purposes for which Rocky Mountain National Park (the only national park involved in this litigation) were created received much less attention at hearings, in briefs, and in oral arguments than was given to the issue of national forest purposes. There are undoubtedly several reasons for this, perhaps the most significant being that the amounts of water involved and potential injury to the objectors are not so great as for national forests. Nevertheless, since waters available under the reservation doctrine are related specifically to the purposes of the reservation, the issue of park purposes must be explored and resolved fully.

a. *Claim of the United States and Objections Thereto.*

In its statements of claim and applications, the United States claimed that Rocky Mountain National Park was created for the following numerous purposes:

1. Recreation;
2. Domestic uses;
3. Municipal and administrative-site uses;
4. Agriculture and irrigation;
5. Stock grazing and watering;
6. The development, conservation, and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;
7. Fire fighting and prevention;
8. Forest growth, management, improvement, and protection;
9. Commercial, drinking, and sanitary uses;
10. Road watering;
11. Watershed protection and management and the securing of favorable conditions of water flows;
12. Wilderness preservation;
13. Flood, soil, and erosion control;
14. Preservation of scenic, aesthetic, and other public values; and
15. Fish culture, conservation, habitat protection, and management.

With respect to the final category listed, the United States claimed the right to utilize reserved waters for the maintenance of continuous, uninterrupted flows of water and minimum stream and lake levels.

At least one of the objectors has taken the position that Rocky Mountain National Park was withdrawn for narrower purposes. See Answer Brief of Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District, pp. 17-18. It cites 16 U.S.C. §1, which provides in pertinent part:

“... the fundamental purpose of the said parks, ... is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

This statute applied to national parks in general. The objector also cites 16 U.S.C. §191, which established Rocky Mountain National Park in 1915. In pertinent part it states that the park is:

“... reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and is dedicated and set apart as a public park *for the benefit and enjoyment of the people of the United States, under the name of the Rocky Mountain National Park* ...” (emphasis supplied)

Finally, the Secretary of the Interior, under whose control

the park lies, may, according to 16 U.S.C. §195, issue reasonable rules and regulations for the park:

“... as he may deem necessary or proper for the care, protection, management, and improvement of the same, *the said regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof.*” (emphasis supplied)

It should be noted that the United States in its brief and oral arguments, while not affirmatively abandoning the broad statement of purposes made in its claim, did cite these very same statutes when discussing the purpose of the park. See Opening Brief of the United States, pp. 10-11; Argument of Mr. Meshorer, Tr., Dec. 5, 1974, pp. 23-24. In addition, the United States recognized these statutory purposes in its proposed findings. See Proposed Findings of Fact, Conclusions of Law, and Decree of the United States, p. 2-3.

b. *Discussion of Purposes.*

No extensive discussion of the purposes of Rocky Mountain National Park is necessary. Congress, the only body with the power to manage and dispose of federal property, *U.S. Const.*, Art. IV, §3, has made abundantly clear the purposes for which the national park was reserved. Its “fundamental purpose,” like that of all national parks, is to conserve and maintain in an unimpaired condition the scenic, aesthetic, natural, and historic objects of the park, as well as the wildlife therein, in order that the park might provide a source of recreation and enjoyment for all generations of citizens of the United States. See 16 U.S.C. §§1, 195. The park was not established, as were the

forests, for economic reasons, but rather was intended to be a place used ". . . for the benefit and enjoyment of the people of the United States. . ." This interpretation is the only reasonable one in light of the various pertinent statutes, and indeed appears to comply even with the views of the United States in the various materials submitted by it subsequent to its claim. The Master-Referee must conclude that Rocky Mountain National Park was withdrawn and reserved for the purposes clearly stated in the statutes cited above.

c. *Limitations on Water Uses by the United States Within Rocky Mountain National Park.*

One of the objectors in this action, the Water Supply and Storage Company, is the owner of the Grand Ditch which extends fourteen miles into Rocky Mountain National Park. With a decree date of September, 1890 (see Jackson County Water Conservancy District Ex. No. 5, D and D-1), the ditch long predates the establishment of the park. The objector contends that any reserved rights of the United States appurtenant to Rocky Mountain National Park must be subordinate to the rights of the Grand Ditch. The Master-Referee concludes that the contention of the objectors is valid.

Initially, it must be noted that the United States has made no claim to waters which were appropriated under Colorado law as of the date of the creation of the national park or any other of the reservations involved in this case. No such claim could be made as, under the reservation doctrine, only unappropriated waters may be reserved. Since the Grand Ditch substantially predates the establishment of Rocky Mountain National Park, no reserved water rights appurtenant to the park may be found to

supersede water rights in the Grand Ditch perfected under Colorado law.

Further support for this contention may be found in the various acts of Congress dealing with the park. The portion of the park in which the Grand Ditch is located was reserved for park purposes by the Act of June 21, 1930. 46 Stat. 791 (1930), 16 U.S.C. §192b. In 16 U.S.C. §192c, also enacted as part of that Act, it is provided:

"Nothing contained in section 192b of this title shall affect any vested and accrued rights of ownership of lands or any valid existing claim, location, or entry existing under the land laws of the United States on June 21, 1930, whether for homestead, mineral, rights-of-way, or any other purposes whatsoever, or any water rights and/or rights-of-way connected therewith, including reservoirs, conduits, and ditches, as may be recognized by local customs, laws, and decisions of courts, or shall affect the right of any such owner, claimant, locator, or entryman to the full use and enjoyment of his land." (emphasis supplied)

Under 16 U.S.C. §198, the United States accepted Colorado's cession of jurisdiction over Rocky Mountain National Park. The United States assumed sole and exclusive jurisdiction over the park, saving, *inter alia*:

" . . . to the people of Colorado all vested, appropriated, and existing water rights and rights-of-way connected therewith including all existing irrigation conduits and ditches."

These statutes make it clear that the establishment and management of at least that portion of the park in which the Grand Ditch is located was not intended by Congress to interfere with or affect any vested or accrued water rights within its boundaries. The Grand Ditch is one such water right within the park. Thus, no reservation of waters for use on the lands of the national park can be permitted to supersede the water rights of the Water Supply and Storage Company in the Grand Ditch.

d. *Minimum Stream Flows and Lake Levels.*

As in the case of the national forests involved herein, the question of whether the United States may be granted the right to use water under the reservation doctrine to maintain certain minimum stream flows and lake levels within Rocky Mountain National Park is of significance. The Master-Referee has treated the general question of validity of in-place uses under the reservation doctrine fully in his discussion of reserved rights on the national forests. See §V.C.1.e.(4), *supra*. Rather than repeating that discussion here, it is incorporated by this reference.

With respect to the more specific question of whether in-place uses may exist to serve the purposes of Rocky Mountain National Park, the Master-Referee is of the opinion that they do so exist. The conclusion may be even more inescapable than the similar one regarding the national forests. The whole aim of the national park is to provide a source of recreation, in an unimpaired natural setting, for all generations of citizens of the United States. Maintenance of certain minimum flows and lake levels on the national park is absolutely essential to the accomplishment of that aim. To permit the drying up or dewatering of streams would be wholly inconsistent with the purposes of the park. As was also true for national forests, the fact

that the uses are in-place rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States intended to reserve water sufficient to fulfill the purposes of Rocky Mountain National Park, as of the various dates of its reservation, and that the United States is entitled to a reserved right for such purposes, subject to quantification in accordance with the first sentence of §37-92-103(4), C.R.S. 1973.

e. *Priority Date of Rocky Mountain National Park Reserved Right.*

It has been noted, see §V.A., *supra*, and will be discussed at greater length in a subsequent section, see §V.D., *infra*, that the priority date to which the reserved water right is entitled is the date on which the land to which the claimed waters are appurtenant was reserved. This is true in the case of Rocky Mountain National Park as well, though the facts create a small variation in the application of this principle. Rocky Mountain National Park was created by the transfer of land which had been previously reserved for national forest purposes. The reserved right recognized on behalf of the park lands must, therefore, bear a priority date as of the date that the park lands were *transferred* to the park and not the date that they were originally reserved for national forest purposes. This priority date is entirely in keeping with the limitation stated in the decree in *Arizona v. California*, 376 U.S. 340, 84 Sup. Ct. 755, 11 l. Ed. 2d 757 (1964), which awarded a priority date to both Indian and non-Indian reserved rights equivalent to the date of reservation *for relevant reservation purposes* of each area of the reservation upon which water was used. Here the national park reserved right obtains a priority

date as of the date that the lands comprising the park were transferred from the national forest *for park purposes*.

f. *Water Uses Which May Be Made to Fulfill the Purposes of Rocky Mountain National Park.*

As in the case of the national forests, various types of uses may be made of reserved waters to fulfill the purposes for which Rocky Mountain National Park was established. *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v. California*, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). No use may be allowed, however, unless it does in fact go to the fulfillment of a valid purpose of the national park as set forth above. The United States has demonstrated that reserved waters may be employed on the national park for the following uses in quantities, as shall be determined in accordance with this report, sufficient to fulfill the purposes of the park:

1. Recreational uses including, but not limited to, aesthetic uses, campground uses, visitor center uses, attendant facility uses, camper facility uses. Tr. Dec. 14, 1972, pp. 180-181.
2. Domestic uses including, but not limited to, ranger residence uses, ranger station uses. *Id.*, p. 181.
3. Municipal uses including, but not limited to, campground watertand sewer uses, fire protection uses, concessional uses. *Id.*, pp. 181-182.
4. Administrative-site uses including, but not limited to, park office and shop uses. *Id.*, p. 182.
5. Agricultural and irrigation uses including, but not limited to, watering of lawns surrounding

park buildings and structures, campground uses where needed to offset heavy human impact, irrigation of hay for feeding of wildlife. *Id.*, pp. 182-183.

6. Stock grazing and watering uses including, but not limited to, watering of horses and mules of the United States, watering of horses and mules of visitors to the national parks. *Id.*, pp. 183-184.
7. Development, conservation, and management of resident and migratory wildlife and wildlife resources including, but not limited to, watering uses for wildlife. *Id.*, pp. 184-185.
8. Fire fighting and prevention uses including, but not limited to, uses for fighting and preventing wild land or forest fires and structural fires. *Id.*, p. 185.
9. Forest growth and management, improvement, and protection uses including, but not limited to, irrigation of forest areas impacted by heavy human use, forest protection activities necessary to maintain aesthetic and scenic values. *Id.*, p. 185-186.
10. Commercial drinking and sanitary uses including, but not limited to, concession uses, attendant facility uses, provided that all such uses are operated by the United States and not by private individuals having permits, leases, or other permission from the United States. *Id.*, pp. 186-187.
11. Watershed protection and management uses including, but not limited to, reforestation activities necessary to return the watershed to its natural condition. *Id.*, pp. 188-189.

12. Wilderness preservation uses. *Id.*, p. 188.
13. Flood, soil, and erosion control uses including, but not limited to, irrigation of areas subjected to heavy human use. *Id.*, pp. 188-189.
14. Preservation of scenic, aesthetic, and other public values uses. *Id.*, p. 189.
15. Fish culture, conservation, habitat protection, and management uses including, but not limited to, the attainment of minimum stream and lake levels as are necessary to:
 - a. Insure the continued nutrition, growth conservation, and reproduction of those species of fish which inhabited such waters on the date that each area of land in the park on which water is used was reserved. *Id.*, p. 190.
 - b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the date that each area of land in the park on which water is used was reserved. *Id.*, p. 190.

3. *Purposes of the National Monuments.*

As in the case of Rocky Mountain National Park, the issue of the purposes of the national monuments was not litigated with the same intensity as were the purposes of the national forests. Since the purposes of the monuments so closely parallel those of the national park, this is not surprising. A full exploration of those purposes follows.

- a. *Claim of the United States and Objections Thereto.*

In its applications for reserved water rights on the national monuments, the United States again took the approach that the monuments had been created for numerous and broad purposes, including:

1. Recreation;
2. Domestic uses;
3. Municipal and administrative-site uses;
4. Agriculture and irrigation;
5. Stock grazing and watering;
6. The development, conservation and management of resident and migratory wildlife and wildlife resources, the terms wildlife and wildlife resources including bird, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent;
7. Fire fighting and prevention;
8. Forest growth, management, improvement, and protection;
9. Commercial, drinking and sanitary uses;
10. Road watering;
11. Watershed protection and management and the securing of favorable conditions of water flows;
12. Wilderness preservation;
13. Flood, soil, and erosion control;
14. Preservation of scenic, aesthetic, and other public values;
15. Fish culture, conservation, habitat protection, and management.

It was with respect to the final category listed that the United States claimed the right to utilize reserved waters for the maintenance of continuous uninterrupted flows of water and minimum stream and lake levels.

Again, at least one objector actively took the position that the monuments were withdrawn for narrower purposes. *See Answer Brief of the Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District*, p. 19. It cites 16 U.S.C. §1, which provides in pertinent part:

“... the fundamental purpose of the said ... monuments ... is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

The statute established the “fundamental purpose” of all national monuments, including those with which this litigation is concerned.

It should be noted that, while never formally retracting the broad purposes set forth in its applications, the United States did appear to recognize the validity of the narrower purposes stated by 16 U.S.C. §1. *See Proposed Findings of Fact, Conclusions of Law, and Decree of the United States*, pp. 23, 33, 41.

b. *Discussion of Purposes.*

The purposes for which the national monuments were created are clear. The “fundamental purpose” of all national monuments is to conserve and maintain in an unimpaired condition their scenic, aesthetic, natural, and historic objects, as well as the wildlife therein, in order

that the monuments might provide a source of recreation and enjoyment for all generations of citizens of the United States. 16 U.S.C. §1. This interpretation is reinforced by 16 U.S.C. §431, which authorizes the President to establish national monuments for the proper care of “. . . historic landmarks, historic and pre-historic structures and other objects of historic or scientific interests.” Such interpretation is also reinforced by the various documents which reserved the lands now constituting the monuments involved herein. They stress the conservatory function of the monuments and acknowledge their role in preserving various natural and historic phenomena. *See*, for example, Pres. Proc. March 2, 1933, re Black Canyon of the Gunnison Nat. Mon.; Proc. May 24, 1911, re Colorado Nat. Mon.; Pres. Proc. Oct. 4, 1915, re Dinosaur Nat. Mon. The Master-Referee concludes that the purposes of the national monuments in this litigation are those stated by 16 U.S.C. §1.

c. *Minimum Stream Flows and Lake Levels.*

Since the United States seeks the right to utilize reserved waters in the national monuments to maintain certain minimum stream flows and lake levels, the question of whether those uses can be granted in the monuments must be addressed. The Master-Referee is of the opinion that such in-place uses are valid under the reservation doctrine and that certain requested uses may be granted for the benefit of the national monuments involved in this matter. The Master-Referee has treated the general question of the validity of in-place uses under the reservation doctrine fully in his discussion of reserved rights on the national forests. *See V.C.1.e.(4), supra*. Rather than repeating that discussion here, it is incorporated by reference.

With respect to the more specific question of whether in-place uses may exist to serve the purposes of the na-

tional monuments involved herein, the Master-Referee is of the opinion that they do so exist. Such conclusion seems inescapable when considered in light of the recent decision in *Cappaert v. United States*, _____ U.S. _____ (June 7, 1976) (44 L.W. 4736), which found a reserved right to maintain a certain water level in the Devil's Hole National Monument.* The fundamental aim of the national monuments is to provide a source of enjoyment, in an unimpaired natural setting, for all generations of citizens of the United States. Maintenance of certain minimum flows and lake levels on the national monuments is absolutely essential to the accomplishment of that aim. To permit the drying up or dewatering of streams on national monuments would be wholly inconsistent with their purposes. That the uses are in-place, as in the case of national forests and the national park, rather than being serviced by more traditional diversions or impoundments does not prevent their implementation. The Master-Referee must conclude that the United States intended to reserve water sufficient to fulfill the purposes of each of the national monuments and that the United States is entitled to a reserved right for such purposes, subject to quantification in accordance with the first sentence of §37-92-103(4), C.R.S. 1973.

d. *Water Uses Which May Be Made to Fulfill the Purposes of the National Monuments.*

As in the case of each of the other reservations herein, various types of uses may be made of reserved waters to fulfill the purposes for which the national monuments were established. *Arizona v. California*, 373 U.S. 546, 83 Sup. Ct. 1468, 10 L. Ed. 2d 542 (1963); *Arizona v.*

*The *Cappaert* decision cannot be regarded as controlling herein for it involved a different monument, established for its own distinctive purposes. Its reasoning, however, is highly persuasive.

California, 376 U.S. 340, 84 Sup. Ct. 755, 11 L. Ed. 2d 757 (1964). This is the essence of the reservation doctrine. No use may be allowed, however, unless it does in fact go to the fulfillment of a valid purpose of the national monuments as set forth above. The Master-Referee is of the opinion that the United States has demonstrated that reserved waters may be employed on the national monuments for the following uses in those quantities, as shall be determined in accord with this report, sufficient to fulfill the purposes of the reservation. It should be noted that certain uses may be allowed on one or two of the monuments herein, but not on the remainder. This is so because the United States did not demonstrate that such a use had been implemented on that particular monument. This situation will be noted below when it arises. With that in mind, the following uses of reserved water should be granted:

1. Recreational uses including, but not limited to, drinking for the general public. Tr., Jan. 24, 1973, pp. 66-67, 107.
2. Domestic uses including, but not limited to, campground uses, public drinking uses. *Id.*, pp. 67-68, 107.
3. Agriculture and irrigation including, but not limited to, irrigation or reseedling of roadsides, reestablishment of natural grasses. *Id.*, pp. 68-69, 108.
4. Stock grazing and watering including, but not limited to, watering of horses of Park Service employees and horses of visitors to the monument, provided that no reserved water is utilized for stock grazing and watering of stock belonging to persons using monument lands as

permittees, lessees, or under any other form of United States permission. *Id.*, pp. 69-70, 108-109.

5. Uses for the development, conservation, and management of resident and migratory wildlife, including but not limited to, watering of wildlife on the national monuments. *Id.*, pp. 70-72, 109.
6. Fire fighting and prevention uses including, but not limited to, water for fighting and preventing wild land or forest fires and structural fires. *Id.*, pp. 72, 109.
7. Forest improvement and protection uses including, but not limited to, irrigation for the sustenance of natural tree growth, irrigation of areas impacted by heavy human use, water for fighting and prevention of wild land or forest and structural fires. *Id.*, pp. 72-73, 109.
8. Commercial and sanitary uses including, but not limited to, concession and other tourist-related uses, provided that no reserved water is utilized by such uses where such uses are operated by private individuals having permits, leases, or other permission from the United States. *Id.*, pp. 73-74, 109-110.
9. Road watering uses including, but not limited to, water for compaction of roads. *Id.*, pp. 73, 110.
10. Wilderness preservation uses, *Id.*, 75-76, 110.
11. Flood, soil, and erosion control uses including, but not limited to, waters used for the protection and restoration of natural vegetation. *Id.*, pp. 74-75, 110-111.

12. Uses for the preservation of scenic, aesthetic, and other public values. *Id.*, pp. 76-77, 111.
13. Uses for fish culture, conservation, habitat protection, and management, including, but not limited to, minimum stream and lake levels as are necessary to:
 - a. Insure the continued nutrition, growth, conservation, and reproduction of those species of fish which inhabited such waters on the date that each area of land on which water is used within each of the national monuments was reserved.
 - b. Attain and preserve the recreational, scenic, and aesthetic conditions existing on the date that each area of land on which water is used within each of the national monuments was reserved, provided that in the Dinosaur National Monument, no minimum stream flow shall be available except for the Yampa River and not for the Green River or any tributaries of the Yampa or Green Rivers, and provided further, that in the Black Canyon of the Gunnison National Monument no minimum stream flows shall be available except for the Gunnison River and not for any other streams in said National Monument, and provided further that in the Colorado National Monument, no water shall be used for fish culture, conservation, habitat protection, and management, including the attainment and maintenance of minimum stream flows and lake levels. *Id.*, 77-80, 111-113.

(pp. 190-314, Vol. 1, Partial Master-Referee Report Covering All of the Claims of the United States of America.)

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12174

AVONDALE IRRIGATION DISTRICT,)
DALTON GARDENS IRRIGATION)
DISTRICT, and HAYDEN LAKE)
IRRIGATION DISTRICT,)

Plaintiffs,)

v.)

NORTH IDAHO PROPERTIES, INC., and)
Idaho corporation, et al,)

Defendants,)

and)

UNITED STATES OF AMERICA,)

Intervenor-appellant,)

and)

ROBERT J. ADAMSON, et al,)

and)

R. KEITH HIGGINSON, Director of Water)
Administration, Idaho State Department of)
Water Administration)

Intervenor-respondents.)

Pocatello term,
September,
1977

Filed: March 15,
1978

No. 12482

JOHN SODERMAN and MARTHA
SODERMAN, husband & wife; FARRELL
STOOR and MARGARET STOOR, husband
& wife; FRANK STOOR and PAT STOOR,
husband & wife; OSCAR VIAS and VERDA
VIAS, husband & wife; ALFRED VIAS, a
single man; JACK NUFFER and PHYLLIS
NUFFER, husband & wife; LEITH R.
SOMSON and VIRGINIA SOMSON,
husband & wife; and DAN MORAN, a single
man,

Plaintiffs,

v.

DR. EVAN KACKLEY and LOIS
KACKLEY, husband & wife; J. C. SMITH
and VERA D. SMITH, husband & wife;
BLUE MOUNTAIN GRAZING
ASSOCIATION, INC., a corporation;
UNITED STATES OF AMERICA through
the UNITED STATES FOREST SERVICE,
Department of Agriculture; THE BUREAU
OF INDIAN AFFAIRS, Department of the
Interior; THE STATE ENGINEER,
Department of Reclamation, STATE OF
IDAHO,

Defendants,

and

R. KEITH HIGGINSON, Director, Idaho
Department of Water Resources,
Cross-claimant, Appellant,

v.

UNITED STATES FOREST SERVICE,

Cross-defendant, Respondent.

R. H. Young, Clerk

Appeal No. 12174 from the District Court of the First
Judicial District of the State of Idaho, Kootenai County. Hon.
Watt E. Prather, District Judge. *Affirmed*.

Appeal No. 12482 from the District Court of the Sixth
Judicial District of the State of Idaho, Caribou County. Hon.
Francis J. Rasmussen, District Judge. *Reversed and remanded*.

Consolidated appeals from judgments concerning federal
reserved water rights.

Wayne L. Kidwell, Attorney General, and
Josephine P. Beeman, Assistant Attorney General,
Boise, Idaho, for Department of Water Resources.

Paul L. Westberg, United States Attorney, Boise,
Idaho; Larry G. Gutierrez, United States
Department of Justice, Washington, D.C., for United
States.

BAKES, J.

III

. . . It is now well established that when the federal
government reserves land from the public domain it also, by
implication, reserves rights to the appurtenant and then
unappropriated water necessary to accomplish the purpose of
the reservation. This reserved water right vests on the date of
the reservation and is superior to the rights of subsequent
appropriators. *Cappaert v. United States*, 426 U.S. 128, 96 S.
Ct. 2062 (1976); *Colorado River Water Conservation District
v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d
483 (1976); *United States v. District Court for Eagle County*,
401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971);
Arizona v. California, 373 U.S. 546, 83 S. Ct. 1468, 10 L.
Ed. 2d 542 (1963); *Winters v. United States*, 207 U.S. 564,
28 S. Ct. 207, 52 L. Ed. 340 (1908); see *Ranquist, The
Winters Doctrine and How It Grew: Federal Reservation of
Rights to the Use of Water*, 1975 B.Y.U.L. Rev. 639.

Although originating in a case concerning water rights on an Indian reservation, *Winters v. United States*, *supra*, this reserved water rights doctrine has been held to apply to other federal enclaves including national forests. *Cappaert v. United States*, *supra*; *United States v. District Court for Eagle County*, *supra*; *Arizona v. California*, *supra*. This doctrine was most recently considered by the United States Supreme Court in *Cappaert v. United States*, *supra*. That case involved reserved water rights in an underground pool in Devil's Hole National Monument inhabited by a unique species of desert fish. Heavy pumping of groundwater for irrigation purposes on private land several miles away caused the water level in the pool to drop below the minimum level necessary for propagation of the rare fish species. The Supreme Court concluded that the protection of this rare fish species was a purpose for which the Devil's Hole National Monument was created in 1952. Therefore the Court held that under the reserved water rights doctrine the United States was entitled to have the groundwater pumping, which had commenced subsequent to the creation of the Devil's Hole National Monument, curtailed, but only to the extent necessary to preserve the minimum water level necessary for preservation of the fish species. -

Similarly, in these two cases the United States asserts a reserved non-consumptive right to the natural flow of these several streams in two national forests. However, as the Supreme Court made clear in *Cappaert*, the United States is entitled to such a water right only if, and only to the extent it "is necessary to fulfill the purpose of the reservation, no more." 426 U.S. at 141, 96 S. Ct. at 2071.

In *Cappaert* the United States Supreme Court ascertained the purpose for which the Devil's Hole National Monument was reserved by examining the presidential proclamation creating it and the statutory authorization for the reservation. We must do the same in these cases in order to determine the

purposes for which the Coeur d'Alene and Caribou National Forests were created.

These two national forests were created by presidential proclamations — the Coeur d'Alene National Forest on November 6, 1906, 34 Stat. 3256, and the Caribou National Forest on January 15, 1907, 34 Stat. 3267.⁶ These proclamations do not indicate the purpose for the reservations, but do state that the reservations were made pursuant to section 24 of the Creative Act of 1891. Section 24 of that Act states:

"The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as [national forests], and the President shall, by public proclamation, declare the establishment of such [forests] and the limits thereof." Ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified at 16 U.S.C. § 471).

That statute does not state the purpose for which the President may reserve public lands as national forests, just the requirement that the public land reserved be covered with timber or undergrowth. However, the congressional debates and memorials read in those debates suggest that Congress was concerned with the preservation of timber stands in order to assure a continuous supply of timber and the protection of watersheds in mountainous areas in order to control the water flows in the lower valleys.⁷

⁶ The reservations are referred to as forest reserves in the presidential proclamations and early statutes. The name was later changed to national forest. Ch. 2907, § 1, 34 Stat. 1256, 1269 (1907).

⁷ See 21 Cong. Rec. 2537-39 (1890); 22 Cong. Rec. 3611-16 (1891).

Six years later Congress passed what is now referred to as the Organic Administration Act of 1897.⁸ That Act provided that national forests were to be established in accordance with the following provisions:

"All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as [national forests] under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

"No [national forest] shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." Ch. 2, § 1, 30 Stat. 11, 34-35 (1897) (codified at 16 U.S.C. § 475).

In this Act Congress stated that national forests were to be established for the purpose of securing favorable conditions of water flows and a continuous supply of timber. The United

⁸ What is presently called the Organic Act of 1897 was passed as a rider to the Sundry Civil Expense Appropriation Act of 1897, Ch. 4, § 1, 30 Stat. 11, 34-36, and is generally codified at 16 U.S.C. §§ 473-478, 479-482, 551. See 30 Cong. Rec. 899 (1897).

States argues that the phrase "to improve and protect the forest within the boundaries" is a separate and distinct purpose for the creation of national forests and refers not only to the protection of trees, but also to the protection and improvement of the entire forest ecosystem, including fish and wildlife, and the forest's aesthetic and recreational qualities. This argument, however, finds no support in the legislative history of the Act. Despite repeated references in the congressional debates to the need to preserve timber resources and protect watersheds, no mention is made of fish and wildlife or the aesthetic and recreational qualities of the forests.⁹ Moreover, the Organic Act expressly provides that water within the national forest may be used for domestic, mining, milling and irrigation purposes.¹⁰ It would indeed be anomalous for this Court to infer, as the United States asks it to do in these cases, a congressional intent to reserve the entire natural flow of these streams when Congress explicitly authorized and contemplated private consumptive use of these same streams.

The Organic Act further provides that it is not to be "construed to prohibit the egress and ingress of actual settlers" or to "prohibit any person from entering upon such

⁹ See, e.g., 30 Cong. Rec. 899-917, 963-1010 (1897) (debates preceding the enactment of the Organic Act of 1897); 25 Cong. Rec. 2371-75, 2430-35 (1893), and 27 Cong. Rec. 85-86, 109-15 (1894) (committee report and debates on the 1892 McRae Bill, H.R. 119. This bill, which was passed by the House but not the Senate, is the forerunner of and substantially the same as the Organic Act of 1897). See generally Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Res. Law. 503 (1974).

¹⁰ "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 481).

forest reservation for all proper and lawful purposes."¹¹ The Secretary of Agriculture¹² is also authorized to "regulate their occupancy and use."¹³ The United States argues that this mandate for regulation of the occupancy and use of the forests indicates that Congress envisioned uses broader than timber management and watershed protection. We agree that Congress contemplated that the public land reserved as national forests would continue to serve a variety of public uses. In *United States v. Grimaud*, 220 U.S. 506, 31 S. Ct. 480 (1911), the United States Supreme Court stated:

"From the various acts relating to the establishment and management of forest reservations, it appears that they were intended

¹¹ "Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of [Agriculture]. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 478).

¹² The "forest reserves" were originally administered by the Secretary of the Interior. In 1905 Congress transferred control to the Secretary of Agriculture. Ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472).

¹³ "The Secretary of [Agriculture] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . ." Ch. 2, § 1, 30 Stat. 11, 35 (1897) (codified at 16 U.S.C. § 551).

'to improve and protect the forest and to secure favorable conditions of water flows.' It was declared that the act should not be 'construed to prohibit the egress and ingress of actual settlers' residing therein, nor to 'prohibit any person from entering upon such forest reservations for all proper and lawful purposes, . . .' (Citations omitted). It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; . . .' (Citations omitted).

"Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another." *Id.* at 515-516, 31 S. Ct. at 482.

Congress chose not to prohibit all public use of the national

forests, but chose to permit lawful uses of the forest land and water subject to regulation to insure that such uses did not interfere with the purposes, timber management and watershed protection, for which the reservations were created. However, the diverse uses which the public has made of the forests cannot be equated with the purposes for which they were originally created. *Mimbres Valley Irr. Co. v. Salopek*, 564 P. 2d 615 (N.M. 1977), *cert. granted sub nom. United States v. New Mexico*, 46 U.S.L.W. 3426 (U.S. Jan. 9, 1978) (No. 77-510). See also *McMichael v. United States*, 355 F. 2d 283 (9th Cir. 1965). Had Congress intended that national forests be created for the purposes of recreation, aesthetics, and fish and wildlife preservation, Congress would have so stated as it did in 1890 when Congress set aside public lands in California as "reserved forest lands" for the "preservation from injury all...natural curiosities or wonders...in their natural conditions [and protection of] fish and game...." Ch. 1263, § 1 & 2, 26 Stat. 650-51 (1890), and in 1916 in the National Forest Park Service Act which provides that the "fundamental purpose of the said parks, monuments and reservations...is to conserve the scenery and the natural and historic objects and the wildlife therein..." Ch. 408, § 1, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1). See *Cappaert v. United States*, *supra*.

The United States also argues that the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, ratifies these additional purposes - recreation, aesthetics, and fish and wildlife preservation - as being among the original purposes for the Creative and Organic Acts. The Multiple-Use Sustained-Yield Act provides in part:

"It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish

purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title." 16 U.S.C. § 528.

In response to this same argument, the New Mexico Supreme Court in *Mimbres Valley Irr. Co. v. Salopek*, *supra*, recently concluded:

"The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be 'supplemental to' the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

"We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated." *Id.* at 618.

We likewise conclude that the purposes for which the forests were created are determined by the law in existence at the time of their creation, and that the additional "supplemental" purposes described were not among those for

which national forests were created pursuant to the Creative and Organic Acts. See *West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz*, 522 F. 2d 945 (4th Cir. 1975).

We appreciate the growing public concern for the protection of fish and wildlife and the preservation of the aesthetic and environmental qualities of the national forests. We are also sensitively aware of the increasing use of these forests for recreational purposes. We are likewise aware that in an arid state like Idaho there often is simply not enough water to fully accommodate all the worthwhile but competing uses. However, the United States Supreme Court made it very clear in *Cappaert* that claims for federal reserved rights are not to be analyzed in terms of an equitable balancing of competing interests, and we do not do so in these cases. Rather, the United States is entitled to previously unappropriated waters necessary to accomplish the purpose for which the reservations were originally created — no more and no less.

We conclude, therefore, that the Coeur d'Alene and Caribou National Forests were created pursuant to the Creative and Organic Acts for the purpose of preserving a perpetual supply of timber and protecting watersheds to secure favorable conditions of water flows. *United States v. Grimaud*, *supra*; *Light v. United States*, 220 U.S. 523, 31 S. Ct. 485 (1911); *United States v. Shannon*, 160 F. 870 (9th Cir. 1908); *Honchak v. Hardin*, 326 F. Supp. 988 (D.Md. 1971); *United States v. Johnston*, 38 F. Supp. 4 (S.D.W.Va. 1941); *Mimbres Valley Irr. Co. v. Salopck*, *supra*. The preservation of fish cultures and habitats and wildlife, and recreational and aesthetic purposes were not contemplated. *Mimbres Valley Irr. Co. v. Salopek*, *supra*. Accordingly, any non-consumptive water rights reserved by the United States in these two national forests are limited to the amount necessary to accomplish the purposes of timber and watershed protection.

IV

In its conclusions of law in *Avondale* the district court ruled that fire and erosion control were not among the purposes for which the Coeur d'Alene National Forest was created. This conclusion was erroneous. The control and prevention of forest fires is an integral part of the greater purpose of timber protection and a purpose clearly contemplated by Congress. Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Res. Law. 503 (1974). Similarly, erosion control is an integral part of watershed protection. However, a review of the record in *Avondale* reveals no testimony or other evidence that the non-consumptive use of the entire natural flow or any minimum stream flow is necessary for fire or erosion control.¹⁴ On the basis of evidence adduced at trial, we agree with the district court that the accomplishment of the purposes of timber and watershed protection in the Coeur d'Alene National Forest does not require any minimum stream flow in the Hayden, Yellow Banks and Mokins Creeks. We have already concluded that the propagation of fish is not a purpose for which the Coeur d'Alene National Forest was created. It follows, therefore, that the United States is not entitled to a minimum stream flow in the downstream portion of Hayden Creek crossing private land to enable fish to spawn in the national forest. For these reasons, we affirm the district court's decision in *Avondale*.

¹⁴ Robert Rice, Deputy Forest Supervisor for the Idaho Panhandle National Forest, testified that the streams are a source for filling small tankers used in fighting forest fires. However, that reference is clearly to a consumptive use of the stream. Claims to consumptive uses are not part of this appeal, but have been resolved in earlier proceedings.

No. 77-510

Supreme Court, U. S.
FILED

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MICHAEL ROBAR, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO*

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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UNITED STATES OF AMERICA, PETITIONER

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*ON WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR THE UNITED STATES

1. A reader of the opening briefs in this case could understandably be left unsure of where the parties differ on the issues presented. There is no dispute about the applicability of the reserved water rights doctrine to national forests or about the legal dimensions of that doctrine. Moreover, New Mexico now acknowledges (Br. 8-9) that the United States enjoys certain reserved water rights in the national forests in general and in the Gila National Forest in particular. To the extent that minimum instream flows are necessary to protect the forest from fire, erosion or dessication of the watershed, the State appears to concede that the United States has a reserved right to minimum instream flows for those purposes (Br. 43-44 and n. 11, 51). Indeed, the State suggests that sufficient water is reserved to the national forests in New Mexico to ensure that they will "continue to exist—very much alive, serene and beautiful" (Br. 82).

While we welcome the State's concurrence on these points, the judgment of the New Mexico Supreme Court reflects no such concurrence. The State now says that "the United States is not barred from asserting that rights to minimum instream flows might be necessary for erosion control or fire prevention on the basis of the recognized purposes of watershed management and the maintenance of timber" (Br. 44 n. 11). The state district court, however, held that "the United States does not have rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 231), and that judgment was affirmed by the New Mexico Supreme Court.¹ The supreme court ruled that "minimum instream flows were not contemplated" among the purposes for which the Gila National Forest was created (A. 241).

It is this ruling, not the ameliorative words of the State's brief, that represents the decision below. This ruling is erroneous, and it must be corrected by this Court.

2. In view of the concessions made by the State with respect to the rights of the United States to reserved water for the protection and maintenance of the national forests, it is difficult to understand why the State has spent a major portion of its brief (Br. 23-42) in seemingly

¹The State argues that the district court and the state supreme court did not mean to foreclose the United States from later arguing that it has a right to minimum instream flows for the protection of the national forests (Br. 44). We do not find any such qualification in the language of the opinions or the judgments below. And even if the State were willing to accede to such later claims, other parties, relying on the state court judgments, might not be so accommodating.

taking issue with our contention that to improve and protect the forest was among the purposes for which a national forest could be created.

This issue is in the case only because of the curious treatment of the Organic Act by the New Mexico Supreme Court. That court initially acknowledged that the Organic Act provided that a national forest could be created for three purposes, including "improving and protecting the forest" (A. 238). But later in its opinion, the court stated that the Gila National Forest was created only "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (A. 241). The State in its brief appears to defend this discarding of "improving and protecting the forest" as an independent purpose for their creation (e.g., Br. 8-9).

The State's interpretation of the "improve and protect" clause, as we understand it, is that "improving and protecting the forest" is a proper purpose for establishing a national forest only if it serves in turn one of the other two statutory purposes, providing timber and ensuring favorable water flows (Br. 34). To be sure, the forests were not intended to be protected and improved *in vacuo*. And, as we pointed out in our opening brief, the focus of the congressional debates on the Organic Act and its predecessors was the service the national forests could provide both in supplying timber and in regulating water flow from the mountain watersheds. Nonetheless, the presence of the "improving and protecting" purpose is important. It demonstrates the concern of Congress, both at the time of the passage of the Act and before, for conservation of the forests and their resources. By omitting any reference to the "improving and protecting" language in its final interpretation of the Organic Act, the New Mexico Supreme Court was able to dismiss the

reserved water claims based on the protection and management of the forest as "environmental and aesthetic concerns" (A. 241) that fell outside the scope of the Act as the court interpreted it.

We agree with the State that the federal government enjoys reserved water rights necessary to protect the forests from injury or destruction. We part company with the State when it claims that the federal government has no rights to reserved water sufficient to maintain a natural forest habitat in the national forests. The State contends that nothing in the Organic Act or any other contemporary legislation was intended to convert the forest reserves into federal game and fish reserves (Br. 45-48). This argument mischaracterizes our position. The reserved right to instream flows is claimed for the purpose of preserving a natural forest habitat, not for the creation of a protected game reserve within the forest. As we have shown in our main brief, Congress directed the Forest Service as early as 1899—and regularly after that time—to provide for the protection of the fish and game resources of the national forests, recognizing that the improvement and protection of the forests involved more than the cultivation of a tree farm and the provision of a water conduit.²

²In response to our contention that the statutory purpose of "securing favorable conditions of water flows" contemplates a minimum level of instream flow, the State has argued that Congress meant by this purpose to allow forest streams to be completely appropriated before they left the forest (Br. 67). This follows, the State says, from the congressional intent that the forest water be available to private appropriators. We submit that the congressional concern with preserving the forest streams as well as the forests (discussed in our main brief, pp. 37-40) demonstrates that Congress did not envision the national forests entirely deprived of any water flow.

3. The State further contends that the federal government's claims to reserved water rights are defeated by three federal statutes providing rights of way for private water users across federal lands.³ The State argues that Congress intended by these statutes to leave the resolution of water rights on federal reservations entirely to state law and to abandon any federal water claims not recognized by state law (Br. 56-67).

This contention proves too much. If these statutes indeed provide for the disposition of all water rights on federal reservations pursuant to state law, then every one of this Court's reserved water rights decisions is incorrect. The reserved water rights doctrine demonstrates that the disposition of water rights on public lands was not left exclusively to state law.

Moreover, the statutes on which the State relies do not purport to abandon any federal claims to water for federal uses. The first statute, Section 18 of the Act of March 3, 1891, 43 U.S.C. (1970 ed.) 946, granted a right of way "through the public lands and reservations of the United States" to qualifying irrigation companies. A proviso to that Section states that the right of way shall not "interfere with the proper occupation by the Government of any such reservation," and that the right of way "shall not be construed to interfere with the control of water for irrigation or other purposes under authority of the respective States or Territories." The

³Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. (1970 ed.) 946; Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. (1970 ed.) 522, 43 U.S.C. (1970 ed.) 959; Forest Right-of-Way Act of 1905, 33 Stat. 628 16 U.S.C. (1970 ed.) 524. All three statutes were repealed by the Federal Land and Policy Management Act of 1976, Pub. L. 94-579, 90 Stat. 2793.

authorities cited by the State (Br. 57-58) make it clear that this proviso was intended to ensure that the right of way did not confer any ownership rights to water independently of state law. Similarly, the 1901 and 1905 Acts provided for rights of way across federal lands; they did not purport to govern the allocation of water rights. None of the right-of-way laws relied on by the State conferred any rights against the United States to either the lands or the waters in the national forests. Instead, the use of the waters in the national forests was left to determination either by state law or by "the laws of the United States and the rules and regulations thereunder." 16 U.S.C. 481.

In *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, this Court made it clear that general statutes providing that state law should govern the allocation of water rights do not bar the federal government from asserting its interests, even when those interests are inconsistent with state law. The Court noted two principles that limit the applicability of state prior-appropriation claims against the federal government. First, the Court held that appropriation rights conferred by state law are limited by the federal government's interest in ensuring the navigability of the nation's rivers. Second, with respect both to navigable and non-navigable streams, the Court observed (174 U.S. at 703):

[I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.

The Court then considered Section 18 of the Act of March 3, 1891, the statute primarily relied on by the State in this case, and determined that neither that Act nor

other federal statutes providing that the disposition of water on federal lands should be governed by state law were intended to permit the appropriation of water from navigable streams "to such an extent as to destroy their navigability" (*id.* at 706). Such an interpretation, the Court held, "is to carry those statutes beyond what their fair import permits" and "is a construction which cannot be tolerated" (*ibid.*).

By parity of reasoning, the same statutes cannot be construed as congressional relinquishment of the federal government's right to the continued flow of the waters in a stream running through a federally owned reservation, "so far at least as may be necessary for the beneficial uses of the government property."⁴

4. The State's response to our claims of reserved water for recreation and stockwatering is, in essence, that while these might have been approved uses of the national forests at the time the Gila National Forest was created, they were not among the purposes listed in the Organic Act and therefore cannot support a claim for reserved water (Br. 73, 78).

We agree with the State that before a national forest could be created, one of the purposes expressly set out in the Organic Act had to be present. Beyond those necessary conditions, however, other purposes were envisioned for the national forests as well. As we noted in our main brief (Br. 43-61), at the time the Gila National Forest was created it was contemplated that the forest

⁴The State seeks to dismiss the *Rio Grande* case as applying only to navigable streams (Br. 64-65 n. 18). That reading ignores the passage quoted above (174 U.S. at 703), which applies both to navigable and to non-navigable streams. The federal government's rights, "as the owner of lands bordering on a stream" to the "continued flow of its water," apply to "every stream within [the State's] dominion" (174 U.S. at 702, 703).

would serve the additional purposes of recreation and controlled grazing. Because recreation and grazing were components that reflected "the nature of the federal enclave," *United States v. District Court for Eagle County*, 401 U.S. 520, 523, the United States should have been granted reserved water to serve those purposes. The State's proposed distinction between forest "purposes" and forest "uses" overlooks the fact that the Gila National Forest was expected, from the time of its creation, to serve these purposes as well as the purposes expressly set out in the Organic Act of 1897.

Congress early and repeatedly recognized that recreation and stockwatering were proper forest purposes. Besides the appropriations for protection of fish and game in the forests, which began in 1899 and have continued regularly since then,⁵ Congress has since 1910 provided annually for the maintenance of grazing programs⁶ and the construction of recreational facilities on the national forests.⁷ In the wake of this unbroken line of congressional approbation, the passage of the Multiple-Use Sustained-Yield Act of 1960 was not, as the State now charges (Br. 79), an attempt by Congress to "rewrite

⁵Sundry Civil Appropriation Act of March 3, 1899, 30 Stat. 1074, 1095. This statute was re-enacted in substantially the same form in each of the next eight years. In 1907, the Agricultural Appropriations Act provided funds "to transport and care for fish and game supplied to stock the national forests or the waters therein." 34 Stat. 1256, 1270. This measure was re-enacted in substantially the same form every year thereafter through 1956. *E.g.*, 41 Stat. 706 (1920); 46 Stat. 408 (1930); 54 Stat. 548 (1940); 64 Stat. 665 (1950).

⁶Agriculture Department Appropriations Act of May 26, 1910, 36 Stat. 416, 430; see also, *e.g.*, 41 Stat. 710 (1920); 46 Stat. 410 (1930); 54 Stat. 548 (1940); 64 Stat. 666-667 (1950).

⁷Agriculture Appropriations Act of June 29, 1937, 50 Stat. 395, 411; see also, *e.g.*, 54 Stat. 546 (1940); 64 Stat. 666 (1950).

history." Instead, the legislative history of that Act accurately recounted that from the earliest days of the national forests, "the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted." H.R. Rep. No. 1551, 86th Cong., 2d Sess. 2-3 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960).⁸

5. In view of the suggestions in the State's brief (Br. 7)—and particularly in light of the alarmist tone of several of the briefs of *amici curiae*—it is appropriate to note that the federal claim to reserved water rights in this case, as in other pending cases, is modest. According to statistics compiled by the Department of Agriculture, the national forests yield more than 200 million acre-feet of water per year. The federal government's reserved water claims for present and future consumptive uses in the national forests in the western states, if upheld by this Court, will not exceed one million acre-feet, or one half of one percent of that yield, and will probably be substantially less.⁹ Moreover, in order to avoid any uncertainty about the future impact of federal reserved water rights claims, the government does not object to a final quantification of its reserved rights in this case and similar cases.

⁸In attacking the view of the national forests taken by Congress in the Multiple-Use Sustained-Yield Act of 1960, the State relies principally on the case of *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*, 522 F. 2d 945 (C.A. 4). That case is inapposite, as it stands for the proposition that the 1960 Act did not overrule the Organic Act of 1897. We have not made any such claim here, nor would any such contention be relevant to the issues in this case.

⁹A letter from the Chief of the Forest Service confirming this limit is attached as an appendix.

Under these circumstances, the arguments of the State and *amici* that the claims of the United States to reserved water rights in the national forests will unduly injure junior claimants who have depended on the availability of forest waters for their livelihood are not well founded.

For the reasons given here and in our main brief, the judgment of the Supreme Court of New Mexico should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
P. O. Box 2417
Washington, DC 20013

April 19, 1978

Mr. James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

I am pleased to provide you with the following information concerning National Forest System's consumptive water uses.

According to our most recent compilations for the six Western Regions of the National Forest System, the total yield of water from National Forest reserved lands amounts to 202,366,000 acre-feet.

We are currently seeking to determine a reliable figure for present and foreseeable National Forest water needs. The outside limit of that figure would not exceed one million acre-feet, an amount less than 0.5 percent of the total yield of those six Regions. Our preliminary estimates indicate that the figure may be substantially lower than that.

This is the limit of the total reserved water rights for consumptive uses the Forest Service will seek in water adjudications for the National Forest System in the six Western Regions.

Sincerely,

JOHN R. McGUIRE
Chief

MOTION FILED
MAR 17 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE AND
BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
v. *Petitioner,*
STATE OF NEW MEXICO,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

Pursuant to Rule 42(3), the National Wildlife Federation, with its principal office at 1412 16th Street, N.W., Washington, D.C., 20036, and the New Mexico Wildlife Federation, with its principal office at 300 Val Verde, S.E., Albuquerque, New Mexico, 87108, move the Court for leave to file the attached brief *amicus curiae* in support of the Petition in the above-captioned case.

Both counsel for the petitioner and counsel for the respondent have consented to the filing of the attached brief. A motion for leave to file is necessary, however, since the petitioner's brief was due on 24 February 1978: the attached brief is thus presented outside of the time allowed under Rule 42(2). A typed copy of the attached brief was delivered to counsel for respondent, via air express, on 14 March 1978.

INTEREST OF THE AMICI

The National Wildlife Federation, a nonprofit membership corporation organized under the laws of the District of Columbia in 1939, is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the National Forests. The Federation is the world's largest conservation organization with a combined membership of over two million persons. Members of the Federation regularly use and enjoy the water resources of the National Forests for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group these individuals comprise a substantial number of public users of the National Forests.

The National Wildlife Federation has been involved with protection of the water resources of the National Forests on several fronts, including: testimony in support of comprehensive forest management legislation; administrative action limiting timber cutting to protect the Bachman's Warbler, an Endangered Species; publication of numerous articles in *National Wildlife Magazine* and *Conservation News* dealing with National Forest and water issues; submission of recommendations to the President's Water Resource Policy Study regarding use of the federal reserve rights doctrine for minimum stream-flow protection.

The New Mexico Wildlife Federation is a nonprofit organization incorporated under the laws of the State of New Mexico and dedicated to the wise use, preservation, aesthetic appreciation and restoration of wildlife and other natural resources. The New Mexico Wildlife Federation has a membership of approximately 4,840 individuals, many of whom regularly use and enjoy the water resources of the Gila National Forest for fishing, hunting, observation, and other forms of outdoor recreation.

This case presents a general issue of great and continuing concern to the National and New Mexico Wildlife Federations and to other public users of the National Forests: the maintenance of an adequate supply of water of sufficient quality to protect the public's interest in the public forest lands and resources. In the present case the specific question is whether the United States is entitled to reserved water rights in the Gila National Forest to protect instream uses of water, including watershed management, fish and wildlife propagation, recreation, livestock watering, fire protection, endangered species protection, and vegetative growth. The New Mexico Supreme Court denied the United States a priority water right for these uses, holding that the Organic Administration Act of 1897, 16 U.S.C. 475, did not include minimum instream flows or recreational water uses within its express purposes. This holding, based upon a sweeping—and, we submit, erroneous—interpretation of the 1897 Organic Act, extends far beyond the boundaries of the Gila National Forest; it threatens the ability of the Forest Service to manage water supplies in the public interest on approximately 187 million acres of reserved forest lands nationwide.

The National and New Mexico Wildlife Federations submit the attached brief to articulate and defend the substantial public interest affected by this decision.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF
NATIONAL WILDLIFE FEDERATION
AND NEW MEXICO WILDLIFE FEDERATION**

INTRODUCTION

This Court has long held that “[l]ands in a forest reserve not only are specifically reserved from sale, but . . . are set apart for a public purpose.” *Chicago M. & St. P. Ry. v. United States*, 244 U.S. 351, 356 (1917). This Court has also repeatedly held that a Federal reservation of public land implicitly reserves unappropriated, appurtenant water to accomplish the public purpose of the land reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The issue here presented is whether Congress intended, by the Organic Act of 1897, 16 U.S.C. 473-482, 511 (hereinafter the Organic Act), to exclude from the public purposes of our National Forests the protection of Forest fish and wildlife resources.

STATEMENT OF THE CASE

The issue here presented was framed by the findings and conclusions of the Special Master who heard the case below, by the trial court's modifications of those findings and conclusions, and by the New Mexico Supreme Court's decision affirming the trial court's decision.

Amicii concur in the Statement presented on page 2 of the Brief of the United States, but would emphasize the following facts:

1.) The Special Master found that as of December 27, 1972, thirty-seven separate water uses had been made by the Gila National Forest, including the following (App. 192-93):

U.S. #	Quantity	Purpose	Appropriation Date
024	2 CFS	Fish	3-2-1899
511	2 CFS	Fish	3-2-1899
786	2 CFS	Fish	3-2-1899
904	0.10 acre ft. per annum	Wildlife	6-18-1908

2.) The Master also found "[t]hat said instream uses numbered 024, 511 and 786 can be made without interfering with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators" (#5, App. 194)¹ and, "[t]hat the United States reserved waters of the Mimbres River Stream System, from its then unappropriated waters, for uses necessary for the requirements and purposes of its reserved lands specified above, with priority dates of the various withdrawals from the public domain" (#4, App. 197).

¹ The purpose of the instream flow was uncontested below and included preservation of fish (including the endangered Gila Trout (*Salmo gilae*)), erosion control, fire protection, watershed protection, wildlife habitat, maintenance of downstream flows and aesthetics.

3.) The Master also expressly found that the purposes of the Forest included recreational uses such as "hiking, fishing, camping and hunting" (#11, App. 198), and fish and wildlife protection (App. 192-93; and #10, App. 198).²

4.) Without taking additional evidence, the trial court deleted from the list of Forest water uses the four fish and wildlife uses noted above (App. 226-27) and overruled the Master's conclusion that fish and wildlife protection was one of the purposes for which National Forests were created.³ The New Mexico Supreme Court affirmed the trial court's holding (App. 241).

ARGUMENT

I. FISH AND WILDLIFE ARE KEY RESOURCES OF THE NATIONAL FORESTS.

The National Forests offer a suitable environment for nearly all forms of fish, game and nongame animals found in the United States. National Forest lands encompass 81,000 miles of streams and 2¼ million acres of lakes and impoundments.⁴ A substantial portion of the country's most productive trout waters are within, or flow from, National Forest areas. These areas are home to

² This independent finding by Special Master Moise corroborates an earlier finding to the same effect by Special Master Rifkind in *Arizona v. California*, 373 U.S. 543 (1964). See, Brief of the United States, at pp. 18-20. These findings by the principal fact finders ought to be accorded great weight.

³ The trial court also specifically concluded that recreational uses—such as hiking, camping, fishing and hunting—were not among the purposes for which the Forest was, or could have been, created (App. 230-31).

⁴ *Hearings on H.R. 1823 Before the Forestry Subcommittee of the House Committee on Agriculture*, 84th Cong., 1st Sess. 14 (1956) (statement of Edward C. Crafts, Assistant Chief, Forest Service).

some 3.3 million big game animals, including more than four-fifths of the country's grizzly bear, moose, and mountain goats; two-thirds of the country's mule deer, black-tail deer and elk populations, and over half of the black bear and bighorn sheep populations.⁵

More than half of the fish and wildlife species currently designated as "endangered" or "threatened" can be found in, or in close proximity to, our National Forests.⁶ In the instant case, the endangered Gila Trout, an inhabitant of the Rio Mimbres River, would be a principal beneficiary of the instream flow requested by the Forest Service (App. 89).

The fish and wildlife resources of the National Forests are vitally important to the commercial and economic well-being of the United States. More than 40 per cent of the salmon taken in the Pacific Coast commercial and sport fisheries are spawned in National Forest waters.⁷ Fishing and hunting activities in the National Forests generate substantial revenues which can be used to offset forest management and maintenance expenses, and the expenditures of hunters, fishers and other recreational users of the Forests contribute significantly to local economies. In the first systematic, interdisciplinary evaluation of our National Forest program, it was determined that the wildlife resources of the Forests had a national value of over \$1 billion.⁸

⁵ *Id.* at 15.

⁶ Robinson, *The Forest Service* (1975), p. 239, note 1 (hereinafter Robinson).

⁷ Department of Agriculture, *Wildlife for Tomorrow*, PA-989 (1972).

⁸ Department of Agriculture, *National Plan for American Forestry*, S. Doc. No. 12, 73d Cong., 1st Sess. 497 (1933) (hereinafter the *Copeland Report*).

More importantly, in the context of this case, wildlife plays an essential role in maintaining the overall health and balance of the forest and in contributing to the production of valuable forest products such as timber. The producing and consuming organisms (i.e., plants and animals) of the forest community interact in a self-regulating manner which perpetuates forest productivity. For example, a plant species may serve as food for a species of insect, which in turn serves as food for a species of bird. It is through a myriad of such relationships that the primary vegetative productivity of the forest is maintained.⁹ The diagram contained in the Appendix illustrates how these relationships contribute to the functioning of the forest.

By 1900 it had become an accepted ecological fact that wildlife is essential to a healthy forest and to sound forest management. It had been shown that certain bird species were of primary importance to efficient and profitable timber production since birds were the only effective means by which insect pests could be controlled.¹⁰ As one noted early twentieth century ornithologist declared, "[w]ere the natural enemies of forest insects [birds] annihilated, every tree in our woods would be threatened with destruction, and man would be powerless to prevent the calamity" (emphasis added).¹¹

This intense interdependence between forest trees and birds was documented in 1903 by Frank M. Chapman:

⁹ Gosz, Holmes, Likens and Bormann, "The Flow of Energy in a Forest Ecosystem," *Scientific American* (March, 1978), p. 102.

¹⁰ W. Hornaday, *Wildlife Conservation in Theory and Practice* (1914), p. 45. See also, Department of Agriculture, "Insect Injuries to Hardwood Forest Trees," *U.S.D.A. Yearbook for 1903* (1904), pp. 313-328.

¹¹ E. H. Forbush, *Useful Birds and Their Protection* (1907), p. 90. As this book notes, birds are not only important sources of insect control but also for seed distribution and tree-pruning. Squirrels are also important in this respect. *Id.* at 99, 100.

Between birds and forests there exist what may be termed primeval, economic relations. Certain forest trees have their *natural* insect foes, to which they furnish food and shelter, and these insects, in turn, have their *natural* enemies among the birds, to which the trees also give a home Hence it follows that the existence of each one of these forms of life is dependent upon the existence of the other. Birds are not only essential to the welfare of the tree, but the tree is necessary to the life of the bird. Consequently there has been established what is termed "a balance of life," wherein there is the most delicate adjustment between the tree, the insect, the bird, and the sum total of the conditions which go to make up their environment (emphasis added).¹²

The principle that sound forest and timber management practices require considerable emphasis on wildlife protection was explicitly recognized in the *Copeland Report*:

All of the relationships existing between game and other of the various products, uses and services inherent in forest lands emphasize the extremely fundamental character of the problems confronted in obtaining satisfactory control and balance of the intricate and interrelated natural factors, and in the application of sound plans involving not only game but timber and all other products and uses of forest land.¹³

As the above writings demonstrate, "improv[ing] and protect[ing] the forest" and "securing favorable conditions of water flows, and furnish[ing] a continuous sup-

¹² Fish and Game Commission of New York State, "The Economic Value of Birds to the State," *Seventh Annual Report* (1903), p. 6.

¹³ *Copeland Report*, *supra* n. 8, at 501. See also, W. T. Hamilton and D. B. Cook, "Small Mammals and the Forest," *Journal of Forestry*, (June, 1940), pp. 468-473. This article describes the important role insectivorous mammals play in insect control and soil conditioning.

ply of timber," Organic Act, 16 U.S.C. 475, means protecting the *wildlife resources* of our National Forests.

II. IN THE SEMI-ARID SOUTHWEST, WATER IS ESSENTIAL FOR FISH AND WILDLIFE PROPAGATION AND SURVIVAL.

The crucial importance of water in the semi-arid regions of our country has long been recognized. As President Roosevelt said in his first State of the Union Address: "In the arid region it is water, not land, which measures production." 35 Cong. Reg. 85 (December 3, 1901). See also, *Arizona v. California*, *supra* note 2, at 598 (in the arid West, water is "necessary to sustain life"). The undisputed record in this case demonstrates that these general principles are especially applicable to the Gila National Forest. The requested minimum instream flow use, although non-consumptive, is essential to the protection of the Forest's resources. As Forester Ritchey, the agent in charge of soil and watershed management for the Gila National Forest, testified: "[I]f the [minimum instream flow] water is taken away, we have a tragedy, no fish, no trees, nothing" (App. 109).¹⁴

In spite of the well-established importance of water in arid regions such as the Gila National Forest, the New Mexico Supreme Court disallowed the use of the sole wildlife watering station in the Forest. The trial court's holding on this question was affirmed even though watering station use accounted for an insignificant consumption of water (30,000 gallons per year) and was extremely

¹⁴ Ritchey's testimony recalls the words of one of the Nation's earliest conservationists, George Bird Grinnell, who, in an 1882 essay entitled "Spare the Trees," wrote regarding the consequences of failing to maintain a balanced forest domain: "No woods, no game; no woods, no water; and no water, no fish." *Forest and Stream* (April 13, 1882).

important to Forest wildlife.¹⁵ As Forester Ritchey explained, the high elevation arid regions of the Forest "literally [provide] the last refuge for our deer and elk and smaller game" (App. 88-89). Since no "stock" watering holes useable by wildlife are found at these altitudes, the Gila's single wildlife watering station was placed "up in the high rocky country" (App. 88). By disallowing this small consumptive use, the New Mexico Supreme Court's decision threatens this "last refuge" and the wildlife it supports with extinction.

III. THE PURPOSES FOR WHICH THE NATIONAL FORESTS WERE CREATED INCLUDE THE PROPAGATION OF FISH AND WILDLIFE AND THE PROTECTION OF THEIR HABITAT.

A. On Its Face the Organic Act is an Unrestricted Mandate to Establish and Administer the National Forests for the Purpose of Improving and Protecting "the Forest," Which Includes Both Plants and Animals.

The Supreme Court of New Mexico (App. 241) and the State of New Mexico (App. 158-59) are obviously in error in asserting that the 1897 Organic Act allowed National Forests to be established only for the purposes of watershed protection and timber production. The very language used by Congress—which the State has characterized as "unambiguous" (App. 158)—clearly states that Forests may be created "to improve and protect the forest within the boundaries, or for the purposes of securing favorable conditions of water flows." 16 U.S.C. 475 (emphasis added). Since the "improve-or-protect-the-forest" clause was listed separately, first in sequence, and

¹⁵ This is approximately the same consumptive use required for a single American home over the course of a year. Department of the Interior Geological Survey, *Water Use in the United States* (1973), p. 5.

set forth disjunctively from the remaining purposes enumerated in the Act, Congress obviously intended it to have meaning beyond the specified watershed and timber purposes.¹⁶

Moreover, the term "forest" as used in this clause, has an accepted common law meaning which includes flora and fauna. The classic definition of "forest" was given in 1615 by John Manwood in his *Treatise of The Laws of The Forest* (pp. 18-19):

A forest is a certaine Territorie of woody grounds and fruitful pastures, privileged for wild beasts and foules of Forest, Chase and Warren, to rest and abide in, in the safe protection of the King

The 1812 edition of *Les Termes De La Ley* defined the prevailing common law meaning of "forest" in similar terms:

Forest is a place privileged by royal authority, or by prescription, for the peaceable abiding and nourishment of the beasts or birds of the forest

This common law definition was carried forward in the 1884 American edition of *Blackstones Commentaries*:

Forests are waste grounds belonging to the King, replenished with all manner of beasts of chase and venery which are under the King's protection"
1 Bl. Comm. 289.

This established meaning of "forest" has been followed in later works. See, *Bouvier's Law Dictionary* 1278 (1914); 1 W.S. Holdsworth, *A History of English Law* 94-95 (1927); *Mozley & Whiteley's Law Dictionary* 141 (9th ed. 1977).

¹⁶ It is a well-known maxim of statutory construction that all words and provisions of statutes are intended to have meaning and are to be given effect. *Wilderness Society v. Morton*, 479 F.2d 842, 856 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

The common law meaning of "forest" is fully consistent with the accepted scientific definition of the term:

The forest may be considered as an assemblage of plants and animals living in a biotic association, or biocenosis. The forest association, then, is an assemblage of plants and animals living together in a common environment.

* * *

The forest community and its habitat together comprise an ecological system, or ecosystem, in which the constituent organisms and their environments interact in a vast and complex energy cycle.¹⁷

Since the statute unambiguously authorizes the reservation of National Forests "to improve and protect the forest" as distinct from protecting watershed and timber resources, and since the accepted common law and scientific meanings of "forest" include the flora and fauna of the forest, there can be no doubt that the Organic Act authorized the creation of National Forests to improve and protect the flora and fauna of the Forest. Under the circumstances of such an unambiguous statute, there is "no need to resort to the legislative history of the Act." *United States v. Oregon*, 366 U.S. 643, 648 (1961).

B. The Legislative History Clearly Shows that Congress Understood the Close Relationship that Exists Between the Plants and Animals of the Forest and Provided for the Protection of Both.

The first Congressional action establishing a forest reserve occurred in 1890 when Congress "set apart as reserved forest lands" several tracts in California. This 1890 Act included among its purposes "the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition." 26 Stat. 650, 651.

¹⁷ S. Spurr, *Forest Ecology* (1969), pp. 2-3.

It was the Congressional intent that among the "natural curiosities, or wonders" to be preserved were the Reserve's indigenous fish and wildlife. Consequently, the "wanton destruction of fish, and game" was prohibited. *Id.*

The following year Congress authorized the President to set apart "public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." 26 Stat. 1103 (1891), *as amended*, 16 U.S.C. 471. The Conference Committee added this provision to a more general public land law revision bill without comment.¹⁸ The obvious objective of the 1891 enactment was to continue to create more "forest reserves," similar to the one which had been created by Congress the year before.

The principal shortcoming of the 1891 statute was its failure to provide for the administration of the forest reserves. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897, *supra*. Several earlier versions of the Organic Act, most notably a bill introduced by Representative McRae of Arkansas, H.R. 119, 53d Cong., 1st Sess. (1896), would have limited the purposes of forest reserves to water supply and timber production.¹⁹ In fact, an amendment to the McRae bill, introduced in the Senate by Henry Teller of Colorado, would have made timber production the sole purpose of forests.²⁰ These approaches were ultimately rejected by the 55th Congress in favor of the broader "improve and protect" language which is now contained in § 475.²¹

¹⁸ R. M. Robbins, *Our Landed Heritage: The Public Domain 1776-1910* (2d Ed., 1976), pp. 301-24 (hereinafter Robbins).

¹⁹ *Id.* at 308.

²⁰ *Id.* at 310.

²¹ *Id.* at 323-24.

In passing the 1897 Act, Congress was well aware of the manifold purposes of forests (the first multi-purpose forest had been created only a few years earlier) and it specifically rejected attempts to narrow those purposes. Moreover, there is nothing in the statute or the legislative history—most of which has been thoroughly explored in the arguments of the United States and the State of New Mexico—to suggest that Congress meant to eliminate fish and wildlife protection as one of the traditional objectives of forest preservation.²²

Further support for the conclusion that the 1897 Act has never been interpreted to exclude fish and wildlife protection can be found in the contemporaneous statements of President Theodore Roosevelt. President Roosevelt's understanding of the purposes of the Forest is critical for several reasons: (1) he was the first President to interpret the authority of the Organic Act; (2) he exercised that authority to the extent of creating 148 million acres of forest reserves—more than three times as many acres as the total set aside in ten years by the three preceding Presidents (Harrison, Cleveland, McKinley) and an amount equal to more than 96 per cent of the total National Forest System today (approximately 154 million acres), and (3) he created the major portion of the Gila National Forest at issue in this case.²³

²² Nor is there any merit to the argument that fish and wildlife protection constitutes a "secondary purpose" of forest preservation. First, the available evidence strongly suggests that fish and wildlife were *included* within the Organic Act's primary purpose, i.e. to "improve and protect the forest." And second, even if fish and wildlife protection be considered a secondary objective, it is nonetheless a *purpose* of the Forests and, as such, is one of the purposes for which water may be impliedly reserved under the reserved rights doctrine. *United States v. District Court of Eagle County*, 401 U.S. 520, 523 (1971) (The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave).

²³ See generally, Robbins, *supra* note 17, at 337-42; and Robinson, *supra* note 6, at 9.

In his 1901 State of the Union Address, President Roosevelt made it clear that among the most important purposes of the forest reserves was the protection of the timber, water and wildlife resources of the Nation's woodlands.

Certain of the forest reserves should also be made preserves for the wild forest creatures. All of the reserves should be better protected from fires. Many of them need special protection because of the great injury done by live stock, above all by sheep. The increase in deer, elk, and other animals in the Yellowstone Park shows what may be expected when other mountain forests are properly protected by law and properly guarded. Some of these areas have been so denuded of surface vegetation by overgrazing that the ground breeding birds, including grouse and quail, and many mammals, including deer, have been exterminated or driven away. At the same time the water-storing capacity of the surface has been decreased or destroyed, thus promoting floods in times of rain and diminishing the flow of streams between rains.

In cases where natural conditions have been restored for a few years, vegetation has again carpeted the ground, birds and deer are coming back, and hundreds of persons, especially from the immediate neighborhood, come each summer to enjoy the privilege of camping. Some at least of the forest reserves should afford perpetual protection to the native fauna and flora, safe havens of refuge to our rapidly diminishing wild animals of the larger kinds, and free camping grounds for the ever-increasing numbers of men and women who have learned to find rest, health, and recreation in the splendid forests and flower-clad meadows of our mountains. The forest reserves should be set apart forever for the use and benefit of our people as a whole and not sacrificed to the short-sighted greed of a few. 35 Cong. Rec. 81, 85-86 (December 3, 1901).

Under accepted principles of statutory interpretation, the contemporaneous interpretations by the agency charged with the administration of a statute are entitled to great weight. *Zuber v. Allen*, 396 U.S. 168, 192 (1969). Here, of course, the contemporaneous interpretation is that of the President of the United States who, in exercising the authority vested in him by the Act of 1891, set aside the majority of the land which comprises the Gila National Forest by proclamations on July 21, 1905, February 6, 1907 and June 18, 1908 (App. 225).

Subsequent Congressional actions confirm that the Organic Act was not intended to exclude fish and wildlife protection or recreation from the purposes of National Forests:

- * The 1899 Appropriation Act required "forest agents" to assist in law enforcement "in relation to the protection of fish and game." 30 Stat. 1074, 1095.

- * The 1907 Appropriation Act stated that one function of the Forest Service was to "care for fish and game supplied to stock the national forests or the waters therein." 34 Stat. 1256.

- * The 1915 Appropriation Act authorized hotels and resorts in National Forests. 38 Stat. 1101.

- * The 1928 McSweeney-McNary Act authorized annual appropriations for investigations to determine "the life histories and habits of forest animals, birds, and wildlife", and to develop "the best and most effective methods for their management and control." 16 U.S.C. 581(d).

- * The 1937 Bankhead-Jones Farm Tenant Act authorized the Secretary of Agriculture to develop a program of land conservation on the public lands to assist in "protecting fish and wildlife . . . and conserving surface and subsurface moisture." 7 U.S.C. 1010.

- * The 1944 Sustained Yield Forest Management Act stated that the purposes of National Forests are intended "to secure the benefits of forests in maintenance of water supply, regulation of streamflow, prevention of soil erosion, and *preservation of wildlife*. 16 U.S.C. 583 (emphasis added).

- * The Organic Act of 1944 contained a provision authorizing expenditures by the Forest Service "necessary for the investigation and establishment of water rights, necessary or beneficial in connection with the administration and *public use* of the national forests." 16 U.S.C. 526 (emphasis added).

In 1960 Congress enacted the Multiple Use-Sustained Yield Act which provided that:

[I]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be *supplemental to*, and not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). . . . 74 Stat. 215, 16 U.S.C. § 528 (emphasis added).

The meaning of the term "supplemental to" was further clarified in both the House and Senate Reports which stated that:

"The authority to administer recreation and wildlife habitat resources of the national forests has been recognized in numerous appropriation acts and *comes from the authority contained in the act of June 4, 1897, to regulate the 'occupancy and use' of the national forests.*" S. Rep. No. 1407, 86th Cong., 2d Sess. 7 (1960); H.R. Rep. No. 1551, 86th Cong., 2d Sess. 7 (1960) (emphasis added).

Moreover, both Reports pointed out that multiple use management, which includes fish and wildlife preserva-

tion as well as recreation, has long been recognized by the Forest Service and by Congress as an appropriate use of the National Forests:

Through the years, by a number of congressional enactments, including appropriations for carrying out specific activities and functions, through court decisions, and through policy directives and statements, the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted. . . . S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960).

The concept of multiple-use management on the National Forests was actually recognized years earlier by Congress. The 1933 *Copeland Report* contains the following statement:

[M]ulti-purpose management for the production, conservation and utilization of timber, forage, water, wildlife and recreational values was *first developed* and is now found generally on the national forests. *Copeland Report*, *supra* note 8, at 89.

The obvious conclusion to be drawn from this compilation of legislative enactments is that Congress was not only well aware of the fish and wildlife purposes of the National Forests, but that it also actively fostered and promoted those purposes through appropriations.

IV. THERE IS NO MERIT IN THE ASSERTION THAT NATIONAL FOREST "USES" HAVE NOTHING TO DO WITH NATIONAL FOREST "PURPOSES"; THE "PURPOSES" FOR WHICH A NATIONAL FOREST IS CREATED NECESSARILY DICTATE WHAT "USES" CAN BE MADE OF FOREST RESOURCES.

New Mexico opposes any consideration of Forest "uses" in determining Forest "purposes." In an attempt to support this position, the State has conjured an imperfect distinction between "use" and "purpose" and has argued

that Forest "uses" have nothing to do with Forest "purposes." (See New Mexico Opposition, at 12).

This argument is mere linguistic sleight of hand. In the first place, there is no disputing the fact that the National Forests have always been used for fish and wildlife purposes and for recreation. Even before the creation of the Forests, these vast public lands were widely used as fishing and hunting areas. These uses have continued to this day.

From the beginning, it was recognized that the national forests were used for recreation such as hunting and fishing, although these activities were not cited in the 1897 act. Robinson, *supra* note 6, at 120, citing M. Frome, *Whose Woods These Are: The Story of the National Forests* (1962), p. 330.

In 1918, the United States Forest Service published a book entitled *Recreational Uses of The National Forests*. In this book it was pointed out that:

Long before the National Forests were established men went hunting in the woods and fishing in the streams. Camping and picnicking in the wilds had an ancient priority over the administration of those same areas by the Federal Government for the production of timber and the conservation of water. *These conditions were not changed by the assignment of the lands to the care of the National Forest Service, except that such recreation uses were multiplied and intensified.*

It is of course inevitable that the Forests should be so used. Outdoor recreation is a necessity of civilized life, and as civilization becomes more intensive the demand grows keener. The vast extent of our present National Forests, their enticing wildness, and the notable beauty of the native landscape lure men and women thither by hundreds of thousands. F. A. Waugh, *Recreational Uses on The National Forests* (1918), p. 3 (emphasis added).

This publication goes on to describe the Forest Service role in the conservation of fish and wildlife on National Forest lands:

Game Preservation. Hunting and fishing are perhaps the sports most typically associated with the Forests. In the great public forests of the Old World the rearing of game for food is often practiced on a large scale. *The propriety of using our National Forests to multiply game for sport, for food, or for its own sake seems obvious.* To these problems the Forest Service has already given considerable study. Specialists from the United States Biological Survey have also assisted materially in this field.

Forest officers everywhere cooperate with other Federal officials and with State and local authorities in stocking streams with trout or lakes with other fish and in their protection under State game laws. Indeed it is almost the rule that the local forest rangers shall be also State game wardens and shall assist everywhere in the enforcement of game laws. *Id.* at 10 (emphasis added).

The book also notes that the roots of our National Forest policy are in European forestry, where wildlife preservation and recreational uses have always been among the paramount purposes of government forests. *Id.* at 4. The author concludes that recreation (hunting, fishing and hiking) "*is inherent in the character of the Forests and must be recognized as a permanent and universal factor in Forest administration.*" *Id.* at 27 (emphasis added). In addition, the Forest Service publication makes the following statements:

Historically it appears that National Forests were first created for purposes of recreation, and that this use is traditionally universal.

* * *

Actually it appears that the National Forests of the United States have always been extensively used

for recreation and that these uses are rapidly increasing.

* * *

The principal forms of recreation now in vogue are hunting, fishing, hiking, packing, camping, automobiling, and picnicking.

* * *

Game preservation has already been recognized as a legitimate and worth-while feature of Forest administration. *Id.* at 36.

* * *

On the basis of this evidence, it is clear that from the beginning it has been recognized that "the forest reserves should be set apart forever for the use and benefit of our people as a whole and not sacrificed to the shortsighted greed of the few." President Theodore Roosevelt's State of The Union Address, *supra*, at 86. The Forests were never intended to serve as sterile monuments; from the creation of the first forest reserve by Congress in 1890 and consistently thereafter they have been intended for the principal purpose of "wise use." It is utterly preposterous to suggest that Forest uses are irrelevant to an evaluation of Forest purposes.²⁴

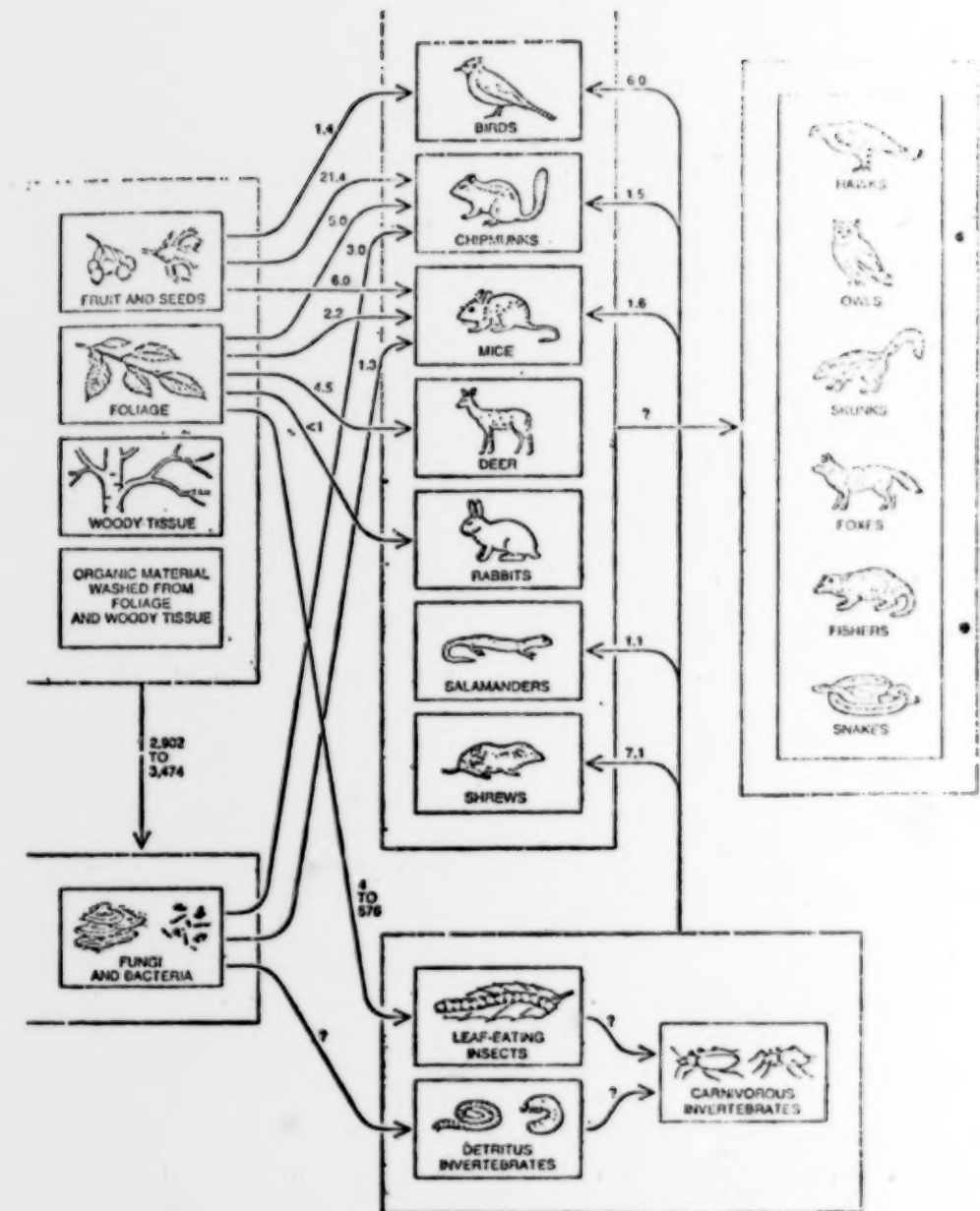
²⁴ The cases cited in support of the use/purpose dichotomy by the State of New Mexico (New Mexico Opposition, at 13), i.e., *United States v. Grimaud*, 220 U.S. 506 (1911), and *McMichael v. United States*, 335 F.2d 283 (9th Cir. 1964), are inapposite. In both cases the Courts expressly found that the 1897 Organic Act gave the Forest Service the authority to regulate the uses involved (i.e., grazing and off-road vehicle use, respectively) in the face of challenges to that authority based upon the argument that such uses were not within the purposes set forth in § 475 of the Act.

Respectfully submitted,

PATRICK A. PARENTEAU
Attorney for Amicus

The contributions to this brief of Donald Baur, second year law student at the University of Pennsylvania School of Law, are gratefully acknowledged.

A-1
APPENDIX

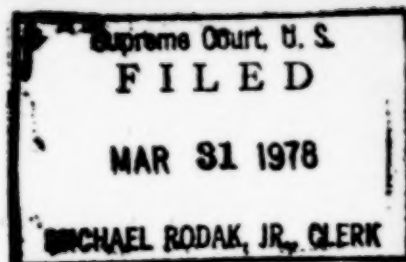


FOOD WEBS of consumers in the Hubbard Brook ecosystem are diagrammed, together with the consumption rate of organisms in each population. All numerical values are in units of kilocalories per square meter per year. The consumption of leaf tissue by herbivorous insects varies greatly from year to year and may have widespread effects on the utilization of energy by other consumers. In most years a large amount of organic material falls to the forest floor and enters

the detritus food web, where it is utilized by fungi, bacteria and certain invertebrates. These organisms serve as food for carnivorous invertebrates, salamanders, snakes and some animals primarily associated with the grazing food web. Birds participate in the grazing food web by eating berries and caterpillars, but they also are able to tap the large detritus energy pool characteristic of northern hardwood-southern coniferous forests by feeding on insects whose larvae feed on detritus.

SOURCE: 238 Scientific American 99 (March, 1978).

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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER
V.
STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NEW MEXICO

BRIEF AMICUS CURIAE OF
PHELPS DODGE CORPORATION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-150

UNITED STATES OF AMERICA, PETITIONER
V.
STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NEW MEXICO

BRIEF AMICUS CURIAE
OF PHELPS DODGE CORPORATION

STATEMENT OF INTEREST OF AMICUS CURIAE

Phelps Dodge Corporation is vitally interested in the outcome of this proceeding and joins with the State of New Mexico in urging the Court to affirm the decision of the New Mexico Supreme Court under consideration in this proceeding.

Phelps Dodge Corporation has for over fifty years owned a large group of patented lode mining claims situate in Grant County, New Mexico, some eleven miles from Silver City, New Mexico. These mining claims were operated as an underground mining operation prior to 1921 but due to the depressed copper market at that time, the operation ceased. In the late 1950's and early 1960's, Phelps Dodge Corporation decided to reopen the mining operation and develop an open pit mine. Incident to the development of the open pit mine, it was determined that it would be necessary to construct a concentrator to process the ore mined prior to shipping the ore for smelting. In order to operate a concentrator of sufficient capacity to process the ore, it was necessary for Phelps Dodge Corporation to acquire, by purchase, a substantial amount of water rights in the Gila water shed. Between the years 1960 and 1973 Pacific Western Land Company, a wholly owned subsidiary of Phelps Dodge Corporation, acquired by purchase water rights allowing them to divert from the Gila Stream System in Grant County, New Mexico, 11,756.281 acre feet of water per year for industrial purposes resulting in an annual consumptive use of 6,562.28 acre feet.

The water rights acquired by Phelps Dodge Corporation were originally acquired by their predecessors in interest as irrigation rights on the Gila stream system under the surface and underground water rights code of the State of New Mexico. The priority dates, as established by the doctrine of prior appropriation, of the water rights acquired by Phelps Dodge Corporation for use in its operations range from a priority date of 1882 to 1962. The method by which these water rights were acquired was either a purchase of the farm to which they were appurtenant or a purchase of the water right without purchasing the land. Thereafter Phelps Dodge Corporation obtained permission from the New Mexico State Engineer, under the appropriate statutes, to change the point of diversion, place and purpose of use. Phelps Dodge Corporation paid approximately \$2,500,000.00 for the necessary water rights to service their concentrator.

In order to utilize the water rights and provide water for the concentrator, Phelps Dodge Corporation constructed a diversion dam in the Gila River, whereby water is diverted to a pumping station from which it is pumped to a storage lake of an area of 62.7 surface acres, named Bill Evans Lake. Thereafter the water is pumped through a twenty-two (22) mile pipeline to the concentrator where it is used in the process.

The concentrator, diversion dam, lake, and pipeline were constructed in 1967 through 1969 at a cost to Phelps Dodge Corporation of approximately \$140,000,000.00.

The lake was transferred by Phelps Dodge Corporation to the New Mexico Game and Fish Department

and it is presently being utilized by the residents of New Mexico and the general Southwest for recreational purposes such as fishing, picnicking and the like.

The New Mexico Game and Fish Department monthly stock Bill Evans Lake with trout and other fish and it is estimated that annually at least 17,000 fishermen and campers make use of the lake and surrounding areas for fishing, picnicking and other outdoor recreational activities.

In connection with the construction of its facility at Tyrone, New Mexico, Phelps Dodge Corporation also built 309 homes for its employees at a cost of approximately \$7,750,000.00. Phelps Dodge Corporation in order to smelt the ore mined at Tyrone, New Mexico, constructed a smelter and townsite in the Playas Valley in Hidalgo County, New Mexico, at an additional cost of approximately \$315,000,000.00. The facility in Tyrone, New Mexico, and the smelting facility in the Playas Valley in the State of New Mexico have a combined employment of 1,149 persons with a current monthly payroll of \$1,797,720.00. The average size of the family, whose head is employed by Phelps Dodge Corporation, is four, therefore, the facilities at Tyrone, New Mexico, and Playas Valley directly support some 4,600 persons.

The location of the diversion dam from which Phelps Dodge Corporation obtains its water for use in its concentrator, is upstream from a portion of the Gila National Forest.

One of the questions which is presented to the Court, in this proceeding, is whether the Court should adopt

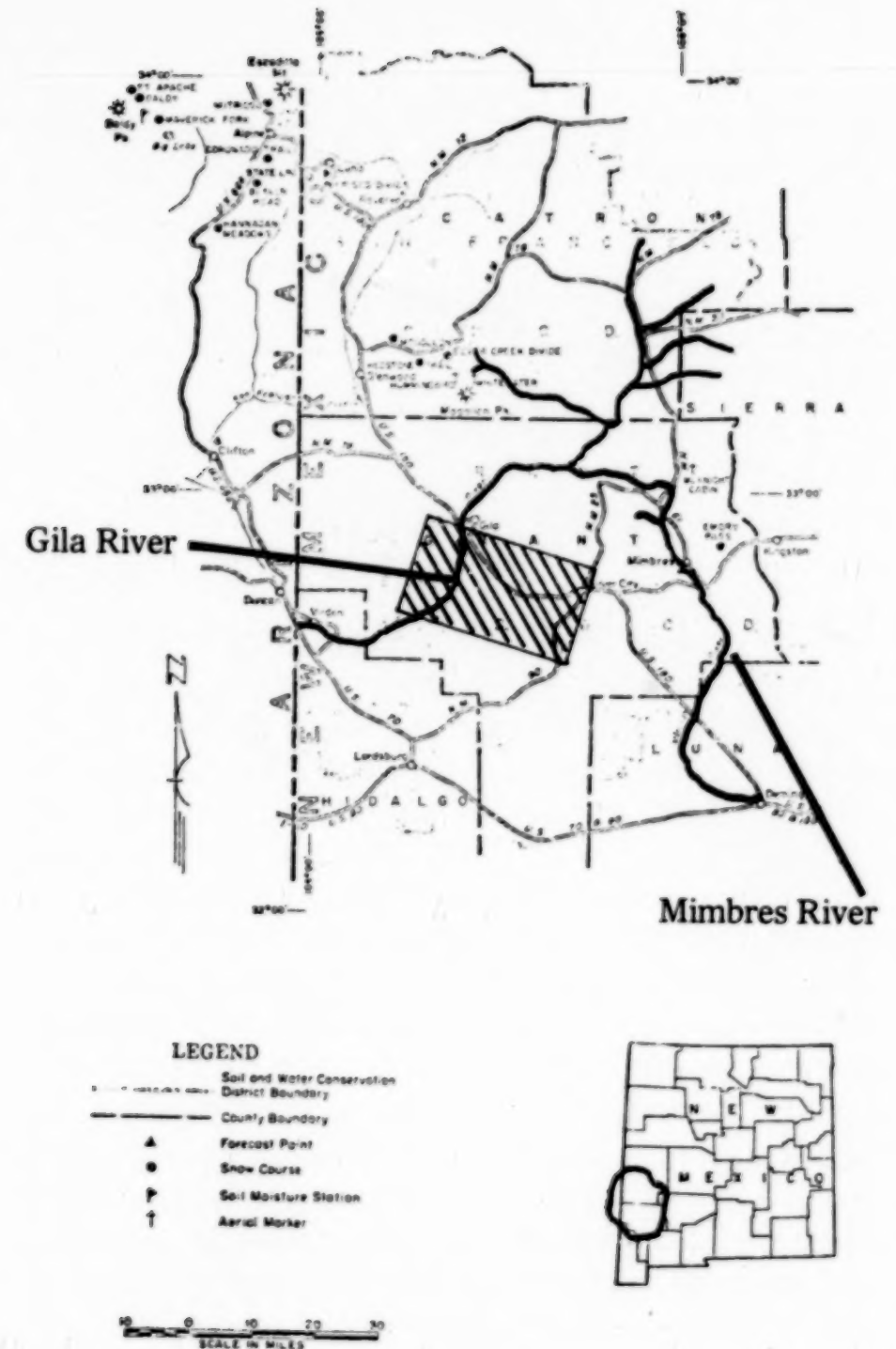
a proposition of law to the effect that the United States is entitled to minimum instream flow in the flowing streams within the confines of its national forests and thereby have the right to curtail upstream uses outside the forest boundaries which might affect the instream flow.

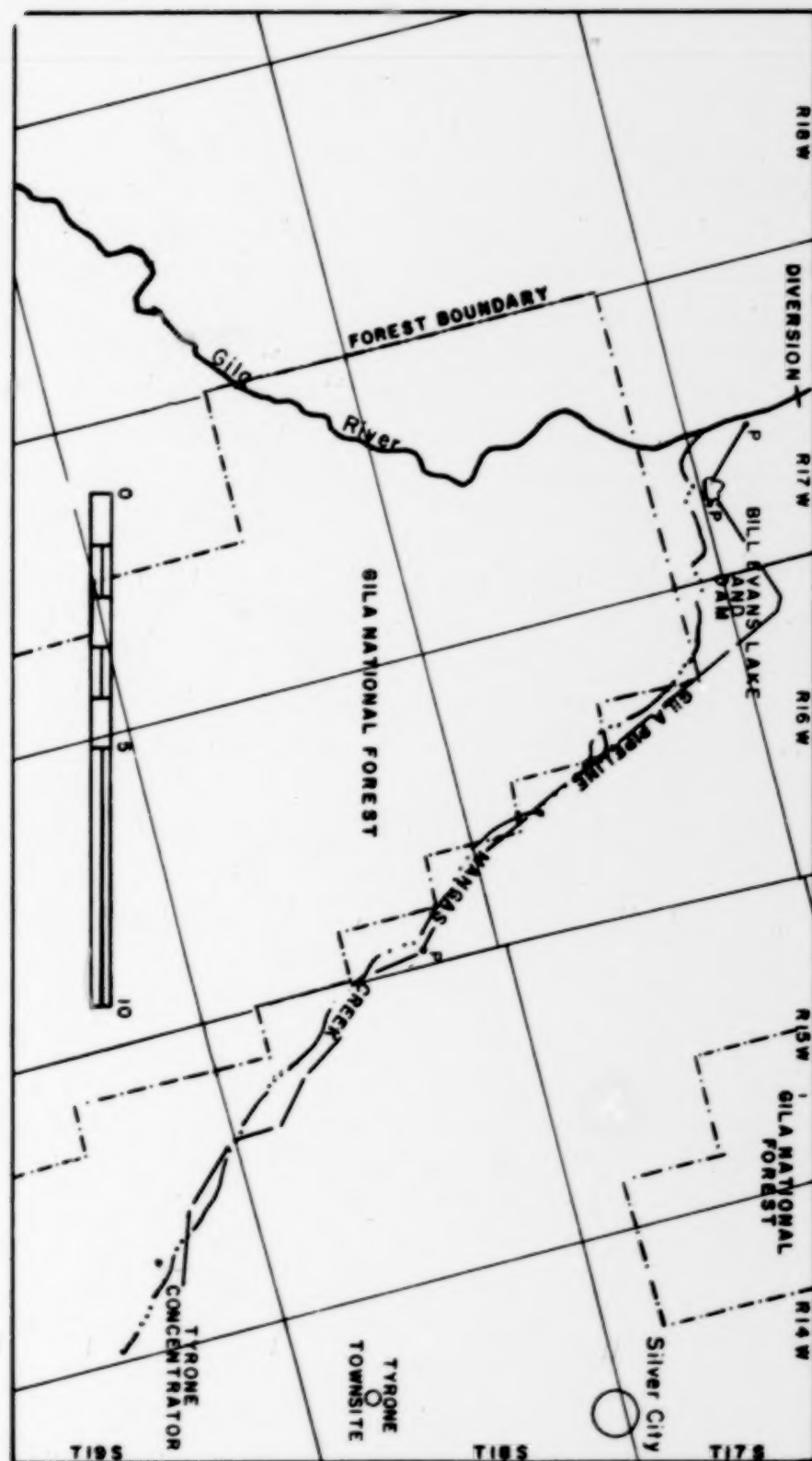
The Gila River stream system at this time is over-appropriated. This area is subject to critical periods of water shortages and droughts. Inasmuch as the diversion dam of Phelps Dodge Corporation is located upstream from a portion of the Gila National Forest, if this Court adopts a rule of law guaranteeing the national forests within the United States minimum instream flow, then in times of water shortages and droughts in the Gila River stream system, it would be necessary for Phelps Dodge Corporation to curtail or cease diverting water from its diversion dam upstream from the Gila National Forest which would in turn result in a curtailment or in closing down the concentrator and mining operations in Tyrone, New Mexico, and the smelter in the Playas Valley. This would result, therefore, in a critical unemployment problem in Grant and Hidalgo Counties, and also Bill Evans Lake could no longer be maintained as a recreational facility.

It is quite obvious if the United States is successful in obtaining guaranteed instream flow in the Mimbres water shed such ruling would most certainly apply to all of the flowing streams situate in the Gila National Forest including the Gila River stream system.

6

7





ARGUMENT

THE UNITED STATES SHOULD BE BARRED FROM CLAIMING MINIMUM INSTREAM FLOW BASED ON THE DOCTRINE OF EQUITABLE ESTOPPEL.

In addition to the propositions of law advanced by the State of New Mexico in support its contention that the Supreme Court of the State of New Mexico should be affirmed, Phelps Dodge Corporation, in this brief, wishes to advance one additional proposition of law which it feels the Court should follow in affirming the decision of the Supreme Court of the State of New Mexico.

The Gila National Forest was established by presidential proclamation in 1899 and the portion of the Gila National Forest which is pertinent to the considerations of this brief were withdrawn by the United States by presidential proclamation February 6, 1907, and February 15, 1909.

The United States since the establishment of the Gila National Forest has taken no steps, nor made known its claims to instream flow until it was joined as a party defendant in the action in the District Court of the Sixth Judicial District of the State of New Mexico, Within and For the County of Luna, No. 6326, entitled "Mimbres Valley Irrigation Co. v. Tony Salopek, et al (A.16). The United States was joined as a party defendant in this action in 1970 (A.16). In its Answer to the Complaint in Intervention, no reference or claim to minimum instream flow was made (A.26). The first indication that the United States claimed minimum instream flow was in its Pre-trial Memorandum filed December 18, 1972 (A.41).

During the period from the establishment of that portion of the Gila National Forest affecting Phelps Dodge Corporation in 1907 and 1909, the United States has slept on its alleged rights to instream flow for the last sixty years.

It is clear that the United States' efforts to establish minimum instream flow, in this proceeding is an attempt on its part, not only to establish this right in the Mimbres water shed, but also in the entire Gila National Forest. The lands which furnish the drainage for the Gila River within the Gila National Forest are in a different water shed from the Mimbres water shed and are subject to the decision handed down by this Court in **Arizona v. California**, 373 U.S. 546, wherein the matters before this Court were not litigated. The decision in **Arizona v. California**, supra, of course, does not cover the Mimbres water shed, however, the application of the doctrine of instream flow sought by the United States would clearly cover the entire Gila National Forest including the Gila water shed.

The decision handed down in **Arizona v. California**, supra, recognizes the proposition of law that the United States had reserved sufficient water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill various forest purposes, and in recognizing this right, the Supreme Court held as follows:

". . . in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest with which the water is used," (underlining added) (376 U.S.340,350 11 L ed 2d 757, 764)

It is seen from the above language that no allusion whatever is made to minimum instream flow. The United States was a party to this action and failed to advance its claim for instream flow during the pendency of this action.

It goes without saying that the United States was aware or should have been aware of the development of water rights in the Gila Stream System subsequent to the withdrawal of the lands of the Gila National Forest. The United States knew or should have known that the development of water rights outside the forest boundaries might adversely affect the minimum instream flow of the Gila River flowing through the forest lands, however, the United States has failed for a period in excess of sixty years to make any claim to instream flow and should now be estopped from doing so.

If the Court will review the Statement of Interest it will note that Phelps Dodge Corporation expended in excess of \$450,000,000.00 to construct its various facilities to mine and process copper ore.

A complete analysis of *Arizona v. California*, supra, in no way would apprise Phelps Dodge Corporation or any other person utilizing water from the Gila Stream System that the United States would at a future time claim minimum instream flow with a priority date of the withdrawal of the various lands from public domain.

Although the doctrine of equitable estoppel is not ordinarily applied to the actions of the United States, there is a substantial body of law holding that this doctrine can be applied in a given fact situation.

One of the cases in which the doctrine of equitable estoppel was applied against the United States is the case of *United States v. Georgia-Pacific Company*, 421 F.2d 92 (1970), where the United States Court of Appeals for the Ninth Circuit held as follows:

EQUITABLE ESTOPPEL

"1. Equitable estoppel is a doctrine adjusting the relative rights of parties based upon consideration of justice and good conscience.

--- (citations omitted)

Pomeroy has defined equitable estoppel as having the effect of absolutely precluding a party, both at law and equity

'(f)rom asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy as

against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'

--- (citations omitted)

2. Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules, *City of Chetopa V. Board of County Com'rs.*, 156 Kan. 290, 133 P.2d 174, 177, (1943). An equitable estoppel will be found only where all the elements necessary for its invocation are shown to the court. The test in this circuit was reiterated in *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104, 84 A.L.R. 2d 454 (9th Cir. 1960):

"Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *California State Board of Equalization v. Coast Radio Products*, 9 Cir., 228 F.2d 520, 525."

3-5. Many kinds of activities — or inactivity — on the part of a defendant may permit the defense of equitable estoppel to be asserted against him. Obviously conduct amounting to fraud would suffice to raise an estoppel against a defendant, but it is clear that conduct far short of actual fraud will also suffice. A party's silence, for example, will work an estoppel if, under the circumstances, he has a duty to speak. A common example of this occurs when a plaintiff knowingly permits a defendant to make expenditures or improvements on property the latter believes to be his, but which in fact the plaintiff knows to be the plaintiff's property. In this case, equity may decree that the plaintiff is estopped from asserting title to the property in question. As the court in *Management & Investment Co. v. Zmunt*, 59 F.2d 663, 664 (6th Cir. 1932), said:

"It is axiomatic that equity will not grant relief to one who has stood by and permitted the expenditure of large sums of money upon the faith and belief that he does not deem his rights to be violated."

The Federal Courts in times of apparent injustice are leaning more and more to a doctrine of law which will

allow the United States to be estopped both in sovereign and proprietary capacities. In the case of *United States v. Lazy FC Ranch*, 481 F.2d 985 (1973), the Ninth Circuit Court of Appeals in applying the doctrine of equitable estoppel against the United States held as follows:

"1. We think the estoppel doctrine is applicable to the United States where justice and fair play require it. The supreme Court applied this rationale in *Moser v. United States*, 341 U.S. 41, 71 S. Ct. 553, 95 L.Ed. 729 (1951).

This Court has also followed this rationale and permitted the estoppel defense against the government in causes where basic notions of fairness required us to do so. A leading example of the application of this principle is *Shuster v. C.I.R.*, 312 F.2d 311 (9th Cir. 1962).

2. The *Moser-Brandt-Schuster* line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. *Gestuvo v. District Dir. of I.N.S.*, 337 F.Supp. 1093 (C.D. Cal. 1971). This proposition

is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. See *Georgia-Pacific*, *supra*."

In the case of the *United States v. Cappaert*, 508 F.2d 313 (1974), the Ninth Circuit Court refused to apply the doctrine of equitable estoppel against the United States, however, in so doing, the Court was careful to state that its decision was based on the facts in that particular case. This case was later appealed to the Supreme Court of the United States, *Cappaert v. United States*, 426 U.S. 128, 48 L. Ed 2d 523, 96 S.Ct. 2062, which affirmed the lower Court's holding. The question of equitable stoppel was not argued before this Court.

In the case of *United States v. Wharton*, 514 F.2d 406 (1975), the United States Court of Appeals for the Ninth Circuit again applied the doctrine of equitable estoppel against the United States and in doing so held as follows:

"6. Since *Georgia-Pacific* we have made it clear that estoppel may be applied against the government acting in its sovereign capacity. See *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). And our decision in *Standard Oil Co. v.*

California, 107 F.2d 402, 416 (9th Cir. 1939), indicates recognition of the principle that estoppel can apply against the government even in disputes over public land, although in that case no sufficient showing of laches or estoppel was made.

This circuit's position on estoppel and its availability as a defense against the government was clearly expressed in *United States v. Lazy FC Ranch*, *supra*.

In *Lazy FC Ranch* we noted that this Court had previously followed the *Moser* rationale and permitted estoppel to be used against the government where basic notions of fairness required it to do so, citing *Schuster v. C.I.R.*, 312 F.2d 311 (9th Cir. 1962), and *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970).

The test of estoppel applied in this circuit was outlined in *Georgia-Pacific*, 421 F.2d at 96:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and

(4) he must rely on the former's conduct to his injury."

Applying the above principle of law to the facts in the instant cause, Phelps Dodge Corporation believes that all the grounds necessary for the application of the doctrine of estoppel are present.

Phelps Dodge Corporation, of course, does not concede that the United States is, in fact, entitled to guaranteed minimum instream flow under the reservation doctrine, however, if the Court should find the United States so entitled, still it should be barred at this late date from claiming this right.

The United States knew or should have known that it was entitled to minimum instream flow as of the date of the withdrawal of the forest lands from public domain, but by its failure to assert this right for a period of some sixty years, Phelps Dodge Corporation and other water appropriators in the Gila stream system were led to believe guaranteed minimum instream flow was not included in the water rights reserved by the United States.

Phelps Dodge Corporation was ignorant of the United States' claim for guaranteed minimum instream flow and could not have determined, prior to the erection of its ore processing facilities, that guaranteed minimum instream flow was, in fact, claimed by the United States. Relying on all information available to

it, concerning the water rights of the United States in the national forests, and on the conduct of the United States in not seeking additional definitions of its rights for a period of sixty years, Phelps Dodge Corporation, at great expense, constructed its ore processing facilities, the operation of which might, at this late date, be threatened by a requirement of guaranteed minimum instream flow within the national forests of the United States.

CONCLUSION

The Judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

J. Wayne Woodbury,
Attorney

March, 1978

Supreme Court U.S.
FILED

APR 3 1978

MICHAEL RUDAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-510

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Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF RESPONDENT

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

Amicus Curiae Salt River Project Agricultural Improvement and Power District (hereinafter "the District") is a municipal corporation and political subdivision of the State of Arizona organized pursuant to Ariz. Rev. Stat. Anno. §§ 45-901 *et seq.* (1956 and 1977 Supp.). By virtue of various contracts, the District and

the Salt River Valley Water Users' Association operate the Salt River Project, a federal reclamation project authorized and constructed under authority of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.* The Salt River Project facilities impound the waters of the Salt and Verde Rivers for storage and delivery to municipal, industrial, and agricultural water users downstream in the Salt River Valley in central Arizona (in the Phoenix area). Over half the population of Arizona resides in the Salt River Valley.

Some 58% of the Salt and Verde River watersheds has been reserved as national forest land, in part for the protection of the water supply of the Salt River Project. The entire flow of the Salt and Verde Rivers is appropriated to specific lands, lying mostly in the Salt River Valley, and the rights of individual landowners to beneficially use the waters on lands within the Salt River Project were confirmed or provided for in a decree of the Arizona Territorial Court on March 1, 1910. The District and the Association are responsible for administration of the rights to Salt and Verde River waters as provided for in the court decree.

Under the court-created federal reserved water rights doctrine as it is presently articulated, the United States may at any time expand its water consumption in pursuance of the original purposes of a federal reservation, up to the limit of all waters unappropriated at the time the reservation was made. It is said that the rights of actual downstream appropriators are junior in entitlement, even though superior in time of actual use, to the prerogatives of the United States. Thus, the Government claims (though the

Court has never been presented with such a case¹) that it may defeat the rights of downstream water users which are senior in time without any obligation of compensation.

In this case the Government claims it has a reserved right to all the water it may ever wish to beneficially use in the future in national forests for recreation, stock watering, and maintenance of minimum stream flows. Application of the Government's claims to the national forests on the Salt and Verde River watersheds would work a gallon-for-gallon expropriation of downstream users whose rights are prior in time to the United States.

The significance of this case is that by grounding its claim to water for recreation, fish and wildlife habitat, and livestock uses in the reserved rights doctrine, the United States claims not the right to preserve such uses but rather the right to commence such uses where they were not previously made, notwithstanding the present or future unavailability of water for such activities. For example, for 70 years the flow of the Salt and Verde Rivers below the reservoirs has been managed solely according to municipal, industrial and reclama-

¹ The only reserved rights cases this Court has decided on the merits involved claims to unappropriated water or water to which the United States (or its Indian beneficiaries) had a priority of actual beneficial usage. In *Winters v. United States*, 207 U.S. 564 (1908) upstream non-Indian diverters had interfered with prior Indian uses. In *Arizona v. California*, 373 U.S. 546 (1963) the Court adjudicated reserved rights to water to which appropriative rights had not attached. In *Cappaert v. United States*, 426 U.S. 128 (1976) the United States had put the reserved waters to actual use long before the Cappaerts sought to appropriate them.

tion water needs. This results in no water releases in some months, and fish populations are lost. If fish uses are an original "reserved purpose" of national forests, the fish purpose might be superior to the property rights of individual appropriators, and the United States might demand the perennial release of water to maintain sport fishing.² Similarly, recreational use of water impounded by Salt River Project dams has never been allowed to prevail over urban and agricultural needs. Recreational uses of water below the reservoirs have been limited, and recreational impoundments above the major reservoirs have been resisted where they would reduce runoff. These historic priorities would be reversed under the Government's submissions in this case.

A specific problem in recent years in the Salt River Project has been a decline in runoff due to increased construction of stock watering ponds in the upper watershed. The Government's claims in this case would allow upstream cattlemen grazing under national forest permits to lawfully impound waters to whatever extent they are physically able to do so. The vested property rights of downstream appropriators would be transferred without compensation to upstream cattlemen because of the fortuity that they graze their cattle on national forest lands.

² If year-round fish habitat on the Salt River were maintained by releasing 100 cubic feet per second during the five months the river is otherwise dry, the annual cost would be \$86,000 in lost hydrogenerating capacity and \$1,691,796 in lost water, appraised at a replacement value of \$56.50 per acre foot.

This Court's federal reserved water rights doctrine runs at cross-purposes to the prior appropriation principles upon which the Congress encouraged the settlement and development of the semi-arid West.³ Therefore, this Court must proceed with extreme caution in applying its doctrine in order to avoid disastrous disruption of complex water law regimes as well as unconscionable frustration of long-established property expectations. This Amicus believes that the Government's contentions in this case vividly illustrate the limitless (and oppressive) conclusions which the uncritical can extract from the simple verbal formulas of the reserved rights doctrine. Thus, in this case the Court must decide whether it will use the reserved rights doctrine with care and precision or whether it will allow sprawling syllogisms to blot out a hundred years of prior appropriation water law and property entitlements. The interest of this Amicus and of the water users it serves is in the affirmance of the decision of the New Mexico Supreme Court and in a cautious and restricted use of the federal reserved water rights doctrine.

³ Priority of actual beneficial usage is made the measure of water rights in all the significant Nineteenth Century federal legislation on water rights. *E.g.* Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of July 9, 1870, ch. 235, 16 Stat. 217; Act of March 3, 1877, ch. 107 §1, 19 Stat. 377, 43 U.S.C. §321 (Desert Lands Act); Act of June 17, 1902, ch. 1093, 32 Stat. 390, 43 U.S.C. §372 (Reclamation Act).

ARGUMENT

I. PREFACE

This Amicus will be greatly damaged by a rule that national forests have reserved water rights for recreation, instream flows for fish, or stockwatering—not so much because we object to continuation of existing uses for those purposes but because there is no unappropriated water left in our watershed to support expansion of those purposes. Recognition of reserved rights for those purposes would be especially pernicious because water can be consumed without limit in furtherance of recreation and in very great quantities for fish and stockwatering.

In our brief we will discuss the stockwatering question in order to bring to the Court's attention the serious consequences of stockwatering for downstream water users. We submit that the discrete question of reserved rights for stockwatering illustrates the serious problems this Court creates by interposing federal common law rules into complex regimes of state property law. This specific illustration should counsel great caution in the application of the reserved rights doctrine.

II. THE EFFECTS OF STOCKWATERING ON DOWNSTREAM WATER RIGHTS

The prevalent method of stockwatering in range areas lacking perennial streams and springs is to construct small earthen reservoirs across natural water courses. These reservoirs (called stock ponds or stock tanks in the West) are made by digging out holes or by raising embankments in the path of the runoff, which collects in the pond and is available to livestock until

it is lost through evaporation and seepage. With the advent of earth moving equipment, stock tanks have proliferated in many parts of the West.

Stock tanks are a very inefficient means of watering livestock. A study of a 1027 square mile watershed in southern Arizona showed that only 1.2% of the consumptive water use of stock tanks was consumed by livestock. Some 98.8% of the loss was to evaporation and seepage.⁴

Studies over the last thirty years have shown that stock tanks significantly reduce the runoff to downstream water users. In the study referred to above, it was concluded that 167 stock tanks reduced runoff by 15%. In a study conducted on a 49 square mile watershed in the Verde River basin in Arizona it was concluded that 27 stock tanks intercepting the flow from 32% of the watershed reduced total runoff by an average of 6.3%.⁵ In seven other studies conducted between 1961 and 1973, streamflow reduction varied between 0% and 44% with an average of 18%. The

⁴ C. Brent Cluff, "Multipurpose Water Harvesting Systems — A Possible Method of Augmenting Streamflow Through Reduction of Inefficient Earth Stock Tanks in Stream Channels on Semiarid Watersheds," Proceedings of National Symposium on Watershed Transitions, pp. 251-256 (June 19-21, 1972, Fort Collins, Colo.)

⁵ Collis Joe Lovely, "Hydrologic Modeling to Determine the Effect of Small Earthen Reservoirs on Ephemeral Streamflow," pp. 34-37 (1976: unpublished master's thesis, University of Arizona, Dept. of Hydrology and Water Resources).

average percentage of watershed above the stock tanks in these studies was 51.3%.⁶

The most authoritative study was one conducted between 1951 and 1954 of the 9,100 square mile watershed of the Cheyenne River basin above Angostura Dam. The estimated average annual reduction in runoff caused by stock tanks was 32%.⁷

All the studies conclude that stock tanks have their greatest proportionate effect in times of water scarcity since they take a first call on available runoff. This factor is probably more important than the average reduction in runoff because the loss of water to stock tanks will cause the downstream users greatest injury when they have greatest need for water.

The expansion of stockwatering to the detriment of vested water rights has led the Arizona legislature to outlaw the construction of new stock tanks without prior state approval after notice to all affected persons. Ariz. Rev. Stat. Anno. § 45-401 *et. seq.* (1977 Supp.)

⁶ *Id.*, p. 9.

⁷ R. C. Culler, "Hydrology of Stock-Water Reservoirs in Upper Cheyenne River Basin," pp. 132-134. U.S. Geological Survey Water Supply Paper 1531-A (1961 U.S. Dept. of the Interior).

III. RECOGNITION OF A RESERVED RIGHT TO STOCKWATERING IS LARGELY UNNECESSARY TO PROTECT EXISTING USES AND WOULD ALLOW FEDERAL ADMINISTRATORS AND PRIVATE CATTLE INTERESTS TO CONFISCATE PRIVATE WATER RIGHTS IN THE FUTURE.

Stock grazing in national forests is an historic and beneficial use of our public lands, and water is essential for that use. Affirmance of the New Mexico Supreme Court decision will probably not affect present stock grazing,⁸ nor will it prevent increased grazing with presently unappropriated waters. But the Government is not here asking for protection of present uses or future uses of unappropriated water. By grounding its claim in the reserved rights doctrine, the government is asking for a license to *increase* stock tank development whenever it chooses to do so in the future, to whatever extent it likes. The water necessary for future expansion is to be taken from private appropriators without the inconvenience of condemnation proceedings.

⁸ Under prior appropriation principles, existing forest stock watering rights may be vulnerable if they are junior in time to downstream rights and there is insufficient water for both. That is unlikely since the mere fact stockwatering uses are currently made suggests either that they have adequate seniority of usage or that injured downstream users have not brought suit and their rights have been or will be extinguished by limitations.

The direct beneficiaries of a reserved right to stock watering will be the cattlemen who graze in national forests. The United States will benefit only indirectly in that it will be able to sell to private ranching interests the privilege of diverting with impunity other people's water. We submit that this result is unconscionable. Yet the result follows inexorably from recognition of a federal reserved right for stockwatering.

The only consideration the Government offers in support of its proposal is administrative convenience. Petitioner's Brief, pp. 57-63. The Government argues that if the stock watering rights are held by the permittees rather than the United States, the rights will have to be transferred under state law procedures whenever the permittees are changed. It would be more convenient for the Government to own the rights directly and thus be able to change permittees without making filings with the state water agencies.

Assuming this problem is real, it falls far short of justifying an open-end federal prerogative to expand stockwatering consumption in the future. The problem is essentially one of who owns the present stockwatering rights, not one of the source of the right. The problem would be fully solved by holding that the United States owns appropriative rights by virtue of the actual beneficial use of its licensees. The Government would then not have to process each change in permittee through the state water agencies though it would have to perfect increased usage under state law. In contrast, the Government's proposed solution to its

problem is not nearly so humble as the problem itself. To avoid paperwork over who owns what, the Government would have this Court hold that the Government owns as much as it wants.

In any event, there is no reason for this Court to conclude that there is a substantial paperwork problem caused by recognition that grazing permittees rather than the United States own stockwatering rights in national forests. If there is a problem, it can be better solved by Congress than by judicial adoption of sweeping principles of federal property law. If the forest service is truly hampered by state water law procedural requirements, the Congress can free the administration of water rights on national forests acquired under state law from such procedural requirements without at the same time revoking the substantive rights of other persons.

As applied to stockwatering in national forests, the federal reserved water rights doctrine serves no substantial purpose. Rather, it would allow federal officials to give the vested water rights of private persons to cattlemen who graze their stock in national forests. Any interests in preserving existing stock watering uses are substantially if not completely met under prior appropriation principles. Federal bureaucratic desires to avoid state-imposed paperwork should not justify mass confiscation of private water rights.

CONCLUSION

While the reserved rights doctrine necessarily frustrates prior appropriation objectives, the extent of that frustration will depend on the amount of water which reservation purposes may call upon. Thus, a reservation use which is modest and predictable in amount will be less harsh to private users and will create less uncertainty about water entitlements than will a reservation use which is highly consumptive or which is uncertain in extent. The only specific standards of quantification which this Court has recognized in federal reserved water rights cases have been limited and definable in amount.⁹ In this case the Government makes modest claims on the Mimbres River,¹⁰ but the principle it advances is not limited to modest claims. The proposed reservation purposes would support highly elastic standards of consumption. Recreational consumption of water is potentially unlimited. The expansiveness of the possible levels of consumption should be enough to discourage the extension of reserved rights doctrine to such uses.

⁹ In *Arizona v. California*, *supra*, the Court acknowledged a right of some Indian reservations to the water necessary to irrigate all of the irrigable land within the reservation. In *Cappaert v. United States*, *supra*, the Court recognized a reserved right to maintain a minimal level of groundwater for a subterranean fish habitat.

¹⁰ Other national forest managers have not been so bashful with the reserved rights doctrine. Managers of the Coconino National Forest in Arizona have claimed reserved rights for future water uses 57 times greater than established consumption. (Letter of November 21, 1972 filed with Arizona Land Department, Water Rights Division)

The Government submits that creation of reserved rights to water is necessary for the preservation of recreational and wildlife uses in national forests, but the factual predicate of the argument is highly improbable. In fact, recognition by this Court of federal property rights for recreation, fish, and livestock watering in national forests will not necessarily promote those objectives but rather will allow federal land administrators to determine whether water shall be used for recreation, fish purposes, or stockwatering. This is because stockwatering uses of intermittent streams are starkly inconsistent with maintenance of those streams for recreational and fish uses. If intermittent water courses are dammed up for stockwatering, it is far less likely that runoff will be available for hiking and camping uses or for fish.

The problems discussed by the Government are far more complex than the Government allows, and those problems will be vastly complicated rather than solved by sweeping judicial creations and destructions of property rights.

The judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

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April 1978

CERTIFICATE OF SERVICE

I, Neil Vincent Wake, one of the attorneys for Amicus Curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing Brief; specifically, that on March 31, 1978 I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three (3) copies of the foregoing Brief of Amicus Curiae addressed to each of the following:

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APR 3 1978

MICHAEL RODAN, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,
v.
STATE OF NEW MEXICO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO

**AMICUS CURIAE BRIEF ON BEHALF OF
MOLYCORP, INC.**

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**AMICUS CURIAE BRIEF ON BEHALF OF
MOLYCORP, INC.**

With the consent of the parties,¹ and in accordance with the provisions of Rule 42(2) of the Rules of the Supreme Court, Molycorp, Inc. (formerly Molybdenum Corporation of America) (hereinafter "Molycorp") submits this amicus curiae brief supporting the position of respondent and urging affirmance of the judgment below.

¹ The Solicitor General, on behalf of petitioner, and the Special Assistant Attorney General of New Mexico, on behalf of respondent, consented to the filing of this brief by letters dated March 23, 1978 and March 29, 1978, respectively. Copies of said letters have been provided to the Clerk of the Court.

Questions Presented

1. Does the reserved water doctrine guarantee the Government only such water as is essential to ensure fulfillment of the explicit statutory purposes set out in the Organic Administration Act of 1897—preservation of forest timber and maintenance of the forest as a watershed regulator; or does it afford the Government as much water as may be required to satisfy all present and future uses to which the national forests may be put?

2. Whether the Government may invoke the reserved water doctrine against miners on patented lands in national forest reserves who, as directed by federal law, have perfected their water rights in accordance with state law?

Interest of the Amicus Curiae

1. The Questa Mine.

Molycorp is the owner of extensive mining, milling and related properties near Questa in Taos County, New Mexico.² These properties consist generally of several hundred patented and unpatented mining claims, patented and unpatented millsite claims and structural facilities for the mining and milling of molybdenum ore.³ All of these properties are located within the original exterior

² These properties are located in Sulphur Gulch, a side canyon of the Red River midway between the towns of Questa and Red River, situated in the Sangre de Cristo mountains of northern New Mexico. (A map of the general area is included at the end of this brief as an appendix.)

³ Molybdenum is used principally as an alloying agent in steel, iron and nonferrous metals. It imparts to those materials strength, hardness, corrosion resistance and durability at extreme temperatures. In addition, molybdenum is used as a paint pigment, a lubricant and a catalyst.

boundaries of the Carson National Forest. (The Carson National Forest was created by Executive Orders dated November 7, 1906, 34 Stat. 3262, and March 2, 1909, 35 Stat. 2240.)

Molycorp acquired the first of its mining claims near Questa in 1920. Underground molybdenum mining operations began in 1923 and continued until 1956. Between 1957-1964 a major open pit mine and processing mill were developed, commencing operations in late 1965. Current mining operations are continuous; twenty-four hours per day, seven days per week, 365 days per year. Present schedules call for a mining rate of about 35,000 tons of overburden stripped per day. In 1977 the average daily tonnage milled was 16,600 tons. Average annual production of molybdenum from the Questa Mine is about 11 million pounds, or about 7% of the entire molybdenum available on the world market. As a result, Molycorp ranks as the world's sixth largest producer of molybdenum.

Molycorp is easily the largest employer in Taos County (employing 10% of the total work force) and, next to local, state and federal governments, the largest single employer in northern New Mexico. The company currently employs, directly, 400 persons at the Questa Mine; it also engages the services of approximately 75 independent contractors. The annual payroll, including fringe benefits, totals \$7.2 million, or approximately 25% of the personal income earned in Taos County. In 1977 Molycorp purchased supplies for the mine in the total sum of \$13.3 million, of which amount \$5.4 million was spent in the State of New Mexico. The same year the Questa operation paid \$1.5 million in local, state and federal taxes.

Since 1964 Molycorp has invested approximately \$125 million in its open pit mine and mill facilities. Recently the company spent an additional \$15 million toward the

future development and expansion of its mining operations in the Questa area. Current plans call for the investment of several hundred million dollars over the next five-six years to develop and bring into production a major new underground mine.

2. Molycorp's Use of Waters from the Red River Stream System.

Molycorp first received a water permit from the State Engineer of New Mexico in 1922, with a priority date of November 9, 1920. This permit, No. 1432, allowed the company to divert surface water from Red River and Columbine Creek for mining, milling and related purposes. Beginning in the early 1960's, Molycorp also began using the waters of several industrial wells for the same purposes.⁴

The Red River, an eastside tributary of the Rio Grande, rises on the east slope of Wheeler Peak, the highest point in New Mexico. From its headwaters, the Red River flows in a northerly direction through the Village of Red River, then turns and flows in a westerly direction toward the Village of Questa.⁵ It thereafter flows in a southwest direction until it empties into the Rio Grande about 5½ miles downstream from the Village of Questa. The drainage area of the Red River Stream System is about 147 square miles, excluding the Cabresto Creek drainage, and over 93 percent is located within the Carson National Forest. The

⁴ These waters are taken from the underground Rio Grande water basin, which is hydrologically interrelated with the surface waters of the Red River Stream System, i.e., pumping of underground water from the Rio Grande basin affects the volume of the surface water flowing in the Red River Stream System.

⁵ The major tributaries of the Red River include Columbine Creek, entering from the south, and Cabresto Creek, entering from the north.

drainage area of Cabresto Creek is about 46 square miles, and virtually all is located within the Carson National Forest.⁶

The first diversions for irrigation are found at the headwaters of the Red River Stream System, approximately 6 miles above the Village of Red River. Molycorp's diversions are located about 4½ miles downstream from the Village of Red River. Major diversions for irrigation are located east of the Village of Questa.⁷ All of these diversion points, specifically including those employed by Molycorp, lie upstream from the lands of the Carson National Forest presently administered by the United States.

Molycorp is currently diverting three cubic feet per second per day from two of its recognized diversion points on Red River. About seven cubic feet per second per day is also obtained from the underground wells, which is the maximum amount that can be drawn from the wells. While Molycorp is currently taking about 10 cubic feet per second of water per day from all of its recognized sources,⁸ extant plans for expansion of the existing operation will increase the demand for water to the maximum (19.454 cubic feet per second) currently allowed under Permit No. 1432.

⁶ State of New Mexico, Office of the State Engineer, RED RIVER HYDROGRAPHIC SURVEY REPORT 1-2 (1973).

⁷ *Id.* at 1.

⁸ Converting cubic feet per second of water flow to gallons, Molycorp currently diverts a total of 4,500 gallons per minute; 270,000 gallons per hour; 6,480,000 gallons per day; or 2,365,200,000 gallons per year. (A second foot of water equals 450 gallons per minute.) Stated another way, Molycorp diverts 19.94 acre feet of water per day or about 7,277 acre feet per annum. (An acre foot of water equals 325,000 gallons.) Of the foregoing amount, Molycorp returns 85% to 90% of the water to the hydrological system. Its consumptive use comes to between 900 to 1,000 acre feet per year. In other words, between 292,500,000 and 325,000,000 gallons of water are depleted from the Red River Stream System and Rio Grande underground water basin per year.

The water diverted by Molycorp is used in the mining and milling of molybdenum ore and for a number of related purposes, including laboratory and domestic uses, wetting down of roads, dust control, revegetation and the transportation of waste to the tailings disposal pond located about 9½ miles from the mill. Evaporation of water in the pond and capillary retention of water in the ore results in the depletion of water.⁹ The water that is not depleted is decanted from the pond and returned to the Red River Stream System.

3. The Red River Adjudication.

The water rights of Molycorp in and to the Red River Stream System, as well as those of some 500 other defendants, are presently being adjudicated in *New Mexico ex rel. Reynolds v. Molycorp Inc.*, Civil No. 9780 (D.N.M., filed November 1972) (hereinafter "Red River Adjudication"), in which case the United States is a plaintiff in intervention.¹⁰ The Government claims a reservation as of 1906 and 1909 of the then unappropriated waters of the Red River Stream System flowing through the lands of the Carson National Forest¹¹ for the following purposes:

watershed protection, fire prevention and fire fighting,

⁹ The extent of the depletion (i.e., consumptive use) allowed Molycorp under Permit No. 1432 was recently litigated between the company and the State Engineer. See *New Mexico ex rel. Reynolds v. Molycorp, Inc.*, No. 1674 (10th Cir. February 3, 1978), which includes a detailed discussion of Molycorp's appropriation and depletion of water.

¹⁰ See Brief for United States at 30 n. 15 (hereinafter "U.S. Br. —").

¹¹ The Government's complaint in intervention in the Red River Adjudication contains the following allegations:

II

... When these lands [the Carson National Forest] were reserved for national forest use, all unappropriated waters in, on or bordering said lands were withdrawn from private appro-

(footnote continued on following page)

fish and wildlife propagation and protection, protection and improvement of grazing lands, erosion control, ecosystem protection, recreation, etc. . . .

Memorandum of United States in Support of Objections to Report of Special Master, filed April 25, 1977, in Red River Adjudication, at 19.¹²

The Government's claim to minimum instream flows in the Red River Adjudication is virtually identical to its claim to such flows in this, the Rio Mimbres, case.¹³ The

(footnote continued from preceding page)

priation as against the United States and were reserved for use on such lands by the United States to the extent that such waters are necessary to fulfill the purposes for which the lands were reserved.

III

The United States claims rights to the use of so much of the waters of the Red River and its tributaries on the lands of the Carson National Forest as is or may become necessary to fulfill the purposes of the national forest with priority dates as of the date of withdrawal for national forest purposes of the area of the Forest within which the water is used.

¹² In the Red River Adjudication the Special Master has filed a report rejecting the Government's claim to minimum instream flows for the enumerated purposes. Objections were filed by the United States. Those objections have been briefed (with New Mexico and Molycorp urging acceptance of the Special Master's report) and were argued before District Judge H. Vearle Payne. However, when the New Mexico Supreme Court handed down its decision in the instant case, the District Judge recused himself because his son, Justice H. Vern Payne, authored the opinion of the New Mexico court. As a consequence of this Court's grant of certiorari herein, the Government's objections to the report of the Special Master have been held in abeyance pending the decision to be rendered in the instant case.

¹³ The Red River Adjudication also involves an additional claim of the United States to reserved water rights in the Red River under the Wild and Scenic Rivers Act of 1968, 82 Stat. 906, 16 U.S.C. § 1271 *et seq.* The Government claims a reserved right as of 1968 to all unappropriated waters of the lower four miles of the Red River, from below the Town of Questa to the confluence

(footnote continued on following page)

legal issues tendered are identical. Insofar as this Court defines and/or limits the reserved water rights doctrine and articulates the statutory purposes for which unappropriated waters flowing through federal forest reservations may be reserved under the Organic Act (specifically, 16 U.S.C. § 475), the decision herein will be determinative of the very same issues tendered in the Red River Adjudication.

4. Molycorp and All Upstream Appropriators of Western River Waters Flowing through Federal Forest Reservations Have a Vital Interest in the Outcome of this Litigation.

If the Government prevails in this case, and the Court does not exclude from its holding upstream mine-related appropriations which predate the federal assertion of a reserved water right,¹⁴ it will inevitably follow that the rights of the Government in and to the stream flows of the Red River in the Carson National Forest will be accorded earlier priority dates than Molycorp's (to wit, 1906-1909 versus 1920). More importantly, Molycorp as an upstream junior appropriator from the Carson National Forest could be required by the Government to forego water diversions from the Red River and its tributaries unless and until the stream flows past the reserved lands reach the adjudicated rate of flow. Additionally, since the underground waters of the Rio Grande basin and the surface flows of the Red River are hydrologically interrelated (i.e., underground pumping may affect the volume of surface water flows), Molycorp could also be ordered to discontinue pumping from its wells.

Molycorp thus faces the very real prospect that the

(footnote continued from preceding page)

of the Red and Rio Grande Rivers. That claim is not here relevant. It can have no impact on Molycorp as a senior, upstream appropriator and does not add or detract from the Government's claims under the Organic Administration Act of 1897, 30 Stat. 11, as amended, 16 U.S.C. § 473 *et seq.* (hereinafter "Organic Act").

¹⁴ See *infra* at 43-50.

Government could require it to shut down the Questa Mine in order that the Carson National Forest receive sufficient water for, among other things, "fish and wildlife propagation and protection, . . . ecosystem protection, recreation, etc." Since, at certain times during the year, the Red River Stream System does not contain sufficient water to satisfy the needs of Molycorp and fellow upstream appropriators and still deliver the requested minimum instream flows to the Carson National Forest, the very future of the Questa Mine is at stake.

But even more is at risk in this case. The economic well being of Taos County (and perhaps all of northern New Mexico) is tied to the future of Questa Mine. Beyond that perhaps parochial concern is the adverse effect to the nation which must follow the abrupt elimination of seven percent of the world's molybdenum supply from the market place. Since, for example, the steel industry is dependent on molybdenum for the manufacture of its products, the consequences of a reversal herein could well be far reaching.

Looking beyond Molycorp and molybdenum, as we believe the Court should, we point out that Molycorp is only one of the multitude of appropriators of western river waters who divert such waters from points upstream of federal forest reservations. All such appropriators will find themselves displaced in the scheme of priorities if the Government prevails herein, and their water diversions will be imperiled if not, in fact, foreclosed.

In the instant case it is undisputed that there are no points of diversion located upstream on the Rio Mimbres from the Gila National Forest. (A. 109)¹⁵ As such, the

¹⁵ The opportunity for downstream appropriators to transfer their points of diversion upstream is strictly regulated by New Mexico law (see N.M. Stat. Ann. §§ 75-5-22, 75-5-23), and there was no evidence offered below as to whether any such transfers were in prospect or even practicable in the instant case.

forest reserve is receiving all of the water that nature has to offer¹⁶ (and is apparently flourishing¹⁷); so that the Government's legal theories imperil no upstream appropriators.¹⁸ By way of contrast, in the Red River Adjudication there are a good number of appropriators upstream from the Carson National Forest, including municipalities, irrigators and, of course, Molycorp, all of whom will be adversely affected if the Government prevails. Indeed, since more than 60% of the flowing waters in the eleven western states pass through federal reservations,¹⁹ there are undoubtedly innumerable upstream appropriators whose water claims may also be imperiled by a reversal. As such, the Court should recognize that what it says regarding water rights in the Rio Mimbres for Gila National Forest could have a profound impact on the economic and demographic structure of the western United States.

Accordingly, Molycorp submits this *amicus curiae* brief in order that its vital interest in the outcome of this case (and the similar interests of all water appropriators upstream from federal forest reservations) may be appreciated and considered. Molycorp supports the position of respondent and urges affirmance of the judgment of the Supreme Court of New Mexico.

¹⁶ While underground pumping downstream from the Gila National Forest might have some impact on the volume of surface water actually flowing through the forest, no proof was offered below to support the proposition that downstream pumping was having any impact on the volume of water nature was delivering to the Gila National Forest.

¹⁷ The one possible exception is the Gila trout; but the fault lies with nature not man.

¹⁸ Indeed, the Special Master granted the Government's request for minimum instream flows only because it made no difference—there were no upstream appropriators who would suffer thereby. (A. 193) The Special Master noted that he might well have rejected the Government's claim had there been such upstream appropriators. (A. 198)

¹⁹ See *infra* at 14.

Summary of Argument

I. The reserved water doctrine has been applied by this Court on only a few occasions, and then, only where the application of the doctrine was essential to accomplish the explicit purposes for which the Government had withdrawn the land involved from the public domain. Consistent with those prior applications, the Court should now specifically hold that the doctrine applies only in those situations where its use is essential to the accomplishment of the explicit purposes of the federal reservation. It should not be construed in such a manner as to provide the Government with an unlimited and undefined right to the waters which flow through the national forests—more than half of the available water supply of the West—in order to satisfy each and every conceivable use to which national forests may ever be put. Extending the reserved water doctrine, as the Government urges, impugns the traditional Fifth Amendment notion that Government taking requires Government compensation. Furthermore, acceptance of the Government's position would place the Forest Service in the unusual position of being able to prefer one user of forest waters over another—hotels over mines, recreation over irrigation—in a shifting, uncontrollable fashion, which would seriously threaten long-established, vested water rights and endanger the economic and demographic structure of the West.

II. The legislative history of the Organic Act reveals that lands could only be withdrawn from the public domain and reserved as national forests for the purposes of timber preservation and watershed maintenance. National forests, unlike national parks, wildlife preserves and other similar federal reservations, were created in full recognition of the fact that they contained valuable natural resources which had to be developed and preserved for the economic well being of the nation. The Organic Act sought

to limit the President's discretion to remove forest lands from the public domain; it did not invest the executive with unchecked discretion to withdraw public lands for the general concern of improving and protecting the forest.

III. Under the Organic Act, the reserved water doctrine is available to the Government in connection with water claims for such things as timber preservation, watershed maintenance, erosion control, fire prevention, and flood control. To the extent that the Government can *prove*, not merely hypothesize, a need to specified quantities of water, including even minimum instream flows, to satisfy such essential purposes, it can claim a reserved right to the use of forest waters. Water necessary to preserve forest wildlife and plantlife, to the extent that fauna and flora can be *proven* to be essential to furthering the purposes for which the national forests were established, would also come under the Government's reservation of water. In this case, however, the Government did not offer any such proof at trial. Accordingly, its claim to reserved water must fail.

IV. Since at least 1866, federal statutes have authorized miners to go upon federal lands to extract the minerals therein. Cognizant of the critical role of water in mining operations, Congress enacted a series of statutes which conferred upon miners the right to use waters found on federal public and reserved lands, and directed miners to perfect their water rights under state law. Consistent with, and in reliance upon, these federal statutory mandates, miners have, for over a century, entered federal lands, staked their claims, received federal patents and perfected their rights to the water necessary to work their mines under state law. In light of this consistent statutory scheme, upon which miners have long relied, the Government may not now invoke the doctrine of reserved water against miners operating patented claims who have per-

fecting their water rights under state law. The Government is estopped from denying its own statutes and patents and rendering worthless years of reliance and billions of dollars of investment capital expended by the nation's miners.

ARGUMENT

I. The reserved water doctrine is a judicial invention borne of necessity, and, as such, it must be carefully tailored to situations where its application is consistent with clear Congressional intent and where the failure to apply it would defeat the purpose of the underlying reservation.

A. Introduction.

The demographic, industrial and agricultural development of the West largely depends upon the availability of water. In 1897, in recognition of the significant role that a uniform water supply would have in the economic development of the West, Congress enacted a statutory scheme for the reservation of national forest lands to protect and preserve western watersheds and thereby ensure a more uniform flow of water through the western waterways.²⁰

Now, four score years later, the Government, somewhat ironically, is asserting an undefined and open-ended claim to national forest waters, and by so doing is injecting a degree of instability which seriously threatens the continued use of western waters by others. The reserved rights claimed here "are wild cards that may be played at any time, blank checks that may be filled in for any amount, or that may never be cashed."²¹ Private, state

²⁰ See *infra* at 32, 36, 37.

²¹ F. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW* 160 (National Water Commission Legal Study No. 5, 1971) (hereinafter "Trelease").

and municipal appropriators of water flowing through national forests can never be certain of the continuing availability of water so long as the use to which the Government might apply such water can change—and change dramatically.²²

The Government now seeks reserved water rights for, among other things, the purposes of improving “fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc.” (U.S. Br. 23). Rather than quantifying or delimiting the scope of its reserved water rights, the Government extends its claim to include “etc.”—an ineffable demand which encompasses all presently conceivable forest uses, as well as those uses which may be conceived of a generation or more from now.

We do not believe it overstates the case to conclude that the Government’s present claim of reserved water rights to satisfy every conceivable use of the national forests could have a profound effect on the continuing development of the West. The full impact of the Government’s present claim is best appreciated when one considers that the water systems which supply more than 50% of the water to the western states either originate in or flow through the national forests.²³ When the national parks are included in this computation, the percentage rises above 60%.²⁴

In view of the significant consequences of the Government’s present claim, it is dangerous to assume, as the Government does, that the reserved water doctrine is a Euclidean axiom. This Court has applied the reserved

²² See Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 72 (1966).

²³ See S. Rep. No. 1407, 86th Cong., 2d Sess. 15 (1960).

²⁴ Trelease, *supra* at 126.

doctrine in only a few cases,²⁵ and it has never specifically explored the scope of the doctrine or set forth its parameters. The picture of sylvan serenity which the Government paints does not obviate the need for careful analysis, nor justify the Government’s assumption that the doctrine has no boundaries at all.

While the Government frames the issue here as only the proper interpretation of the Organic Act, we submit that the essential question to be resolved concerns the proper construction and application of the reserved water doctrine. It is only after this threshold analysis has been completed that this Court should turn its attention to the Organic Act.

The essence of our submission is that the reserved water doctrine should be construed in a manner that will preserve it for those situations in which its application is essential to the accomplishment of the explicit purpose of the federal reservation involved, but curtail it when the Government seeks to invoke it merely to satisfy the various uses to which the federal reservation at issue may be put, thereby threatening, unnecessarily, to upset significant and long-established vested water rights.

B. *Winters-Cappaert*: The Evolution of the Reserved Water Doctrine.

In 1908, when this Court first enunciated the reserved water rights doctrine in *Winters v. United States*, 207 U.S. 564, few persons, including, we submit, the *Winters* Court, would have believed that the doctrine would not only grow to meet the exigencies of future *Winters*-type situations, but would some day serve as the basis for the

²⁵ See *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964); *United States v. Powers*, 305 U.S. 527 (1939); *Winters v. United States*, 207 U.S. 564 (1908).

Government's claim to much of the waters in the West, including a substantial portion of all of the waters of New Mexico.²⁶

In *Winters* the Court was confronted with a situation in which the Indians, who once "had command of the lands and the waters," 207 U.S. at 576, gave up those valuable rights in exchange for a smaller tract of land upon which they would settle and farm. The Indian reservation involved had been established under a treaty of 1888. In settling the Indians on the reservation, the United States hoped to convert them from nomadic hunters to an agricultural people. More than ten years later, however, the defendants, upstream settlers, built dams and reservoirs which diverted the waters from the reservation. Irrigation was necessary if the Indians were to become an agricultural people, and water was necessary for irrigation. Accordingly, this Court concluded that in creating the reservation the "government did reserve [water] . . . and for a use which would necessarily be continued through the years." *Id.* at 577. It was simply incredible "to believe that . . . [the] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits yet did not leave them the power to change to new ones." *Id.*

The judicial invention—the reserved water doctrine—was borne of the necessity of the moment. The implied right was essential to accomplish the express purpose of the treaty involved, namely, the conversion of the Indians from a nomadic to a pastoral way of life. Farming, grazing, stock raising, all would have been impossible had the United States deprived the Indians of the water rights

²⁶ See Trelease, *supra* at 100; *State v. Myers*, 64 N.M. 186, 190, 326 P.2d 1075, 1076 (1958).

which they had before they entered into the treaty. To take away the vast tracts of lands which the Indians had once considered their own and to place them on an arid parcel of land without access to water would have even further aggravated an unfortunate chapter in our nation's history. The reserved water doctrine met the necessity and prevented the problem. It did not, however, confer an unlimited and undefined right to the use of water on Indian reservations. Rather than implying a general right, this Court affirmed the lower court decree which had the effect of establishing rights to specified—not unlimited—quantities of water for one specific use: irrigation. 207 U.S. at 565-566.

Thirty years later, in *United States v. Powers*, 305 U.S. 527 (1939), this Court reaffirmed the reserved water rights doctrine as it applied to the cultivation of Indian reservation lands. As in *Winters*, however, the Court did not specifically articulate the scope of the doctrine or set forth its parameters.

Arizona v. California, 373 U.S. 546 (1963), was the next case to reach this Court in which the reserved water doctrine was involved,²⁷ though of only incidental importance in that case. After more than a decade of legal controversy over the use of the waters of the Colorado River, the rights of the various states to those waters were finally resolved. The Court's lengthy opinion focused, for the most part, on that controversy. Only in the last pages of the majority opinion did the Court even consider the reserved water doctrine, and, then, it did no more than defer to the findings of the Special Master.

²⁷ *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), commonly known as the "Pelton Dam" case, although sometimes cited as a reserved water rights case, did not involve the application of the reserved water doctrine. The Court decided only that the Federal Power Act conferred exclusive jurisdiction on the Federal Power Commission to grant licenses for power projects on reserved lands of the United States. The case did not deal with the water rights of either governmental or private users.

Among the findings of the Special Master was his conclusion that when the United States created the Indian reservations involved in that case "it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. at 596. Irrigation was "essential to the prosperity of these Indians," *id.* at 599, and the reserved water doctrine would serve to supply that essential need.

The reserved right was not unlimited, however, nor did it extend to every conceivable use of water on an Indian reservation. The precise amount of water reserved for irrigation was delineated in the Special Master's Report and adopted in this Court's decree. *Arizona v. California*, 376 U.S. 340, 345 (1964). Although reserved water rights were determined with reference not only to the present use of water on the reservations, but also as to the "reasonably foreseeable needs" of those reservations, 373 U.S. at 600, significantly, the standard by which those foreseeable needs would be determined—"irrigable acreage", *id.* at 601—was well defined. The future needs of the Indians were largely speculative and thus, the Court concluded, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* By embracing a particular standard by which the reserved right could be measured, the Court was able to quantify and define the extent of the Indians' reserved rights. Prospective users of Colorado River waters were thus placed on notice of the existence and extent of the Indians' water rights.

As something of an afterthought, the Court also deferred to the Special Master's conclusion that the United States intended to reserve water necessary "to fulfill the purposes of the Gila National Forest." 376 U.S. at 350. The Court did not consider, much less define, the purposes for which the Gila National Forest had been established, the purposes or uses for which water had been reserved, or the scope,

generally, of the reserved water doctrine as it was applied to non-Indian reservation federal enclaves.²²

It was not until 1976, in *Cappaert v. United States*, 426 U.S. 128, that this Court again confronted the application of the reserved water doctrine.²³ In 1952, pursuant to the authority vested in the President to set aside federal lands of "historic or scientific interest" as national monuments, 16 U.S.C. § 431, President Truman, by executive proclamation, set aside Devil's Hole (in Death Valley) as a National Monument "for [among other things] the preservation of the unusual features of scenic, scientific, and educational interest therein contained." 426 U.S. at 132. As this Court observed in *Cappaert*, additional preambular statements in the Presidential proclamation demonstrated that the monument was being set aside to preserve a unique species of fish which flourished in a pool on the monument grounds. *Id.* Sixteen years after the establishment of the National Monument, the Cappaerts, adjoining landowners, began pumping ground water on their ranch, which had the effect of depleting the water in the National Monument pool to an extent that endangered the species of fish which the monument was expressly designed to preserve.

²² As such, we see no merit in the Government's contention that the doctrine of collateral estoppel bars respondent from contesting the United States' claims to minimum instream flows in the Rio Mimbres. (U.S. Br. 17-22) Moreover, none of the actual appropriators of the waters of the Rio Mimbres were parties to the Colorado River water adjudication, and they are not barred from contesting the Government's claims. Since, in this case, New Mexico appears essentially as *parens patriae*, representing the interests of all such appropriators, the doctrine of collateral estoppel is inapplicable. See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

²³ In two earlier decisions, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); and *United States v. District Court*, 401 U.S. 520 (1971), this Court reaffirmed the existence of the reserved water doctrine, but did not deal with the application of the doctrine. Both decisions involved jurisdictional considerations concerning the amenability of the United States to suit in water rights adjudication proceedings.

Despite this Court's recognition that "the water right reserved by the 1952 Proclamation was thus explicit, not implied," *id.* at 140, the opinion analyzed the case in terms of the implied reservation doctrine. In so doing, the Court emphasized that:

The implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.

Id. at 141. Reasoning that "the pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest," *id.*, the Court concluded that the district court had correctly determined that "the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool and the natural habitat of the species sought to be preserved." *Id.*

The application of the reserved water doctrine in *Cappaert* amounted to little more than a reaffirmation of the Government's explicit rights to the pool in question. Those rights, whether express or implied, were not only consistent with the statutory authorization for, and the executive proclamation establishing, the National Monument, but were essential to the preservation of the species of fish which the monument had been designed to preserve. As in *Winters* and *Arizona*, the rights implied under the doctrine were carefully measured and defined. The application of the doctrine did not afford the United States a right to an unlimited use of water attendant to its reservation of the National Monument lands, but was carefully tailored to ensure the presence of only as much water as was necessary to preserve the particular species involved. Restaurant, lodging and recreational facilities all might be appropriate uses of the Devil's Hole National Monument, but the reserved water rights recognized in *Cappaert* were limited to meet only the particular necessity specifically identified when the land was reserved, to wit, the needs of the "pup fish". The right did not ex-

tend to all peripheral uses of the National Monument. It fulfilled the express purpose of the reservation and "no more." 426 U.S. at 141.

The common theme in these cases is the invocation of the reserved water doctrine in situations where the failure to find a reserved water right would have undermined the essential purpose of the federal reservation. In each case the reservation of water was tailored to meet a specific, perceived necessity; it was not held that the doctrine extended to each and every use to which the federal reservation might be put.

C. The Scope and Application of the Reserved Water Doctrine—Essential Necessity as a Limiting Factor.

There is no reason why the implied water rights of the federal government cannot coexist with state-created rights of private, state and municipal users. The reserved water doctrine should be construed so as to avoid the complete and irresponsible usurpation of all state-granted water rights by the fiction of implied federal rights. While state-granted rights cannot impair the Government's exercise of its implied rights where called for by the exigencies of the situation, the federal rights should not be so expansive, so undefined, as to swallow whole all state-created rights.

As the Government concedes in its brief, "federal statutes . . . [have] deferred to state law to govern the private use of water found on public lands. . . . Under this statutory authority, private appropriators have long been permitted to remove water from national forests for private purposes, including substantial uses such as those involved in mining and irrigation." (U.S. Br. 29-30)⁸⁰ In

⁸⁰ See Organic Act, 16 U.S.C. § 481; Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321; Act of July 9, 1870,

(footnote continued on following page)

the area of mining, for instance, "Congress chose to give federal approval to rights recognized under this system of state and local law—which was uniquely suited to the needs of the mining community—rather than to establish a federal law of water rights."³¹ As explained more fully in the Government's brief in *Andrus v. Charlestone Stone Products Co., Inc.*, the effect of these statutes was to require mines and other claimants to water to perfect their rights under state law. Government patents would convey fee interests in the lands or minerals therein, but they would not convey any rights to appurtenant waters.³²

(footnote continued from preceding page)

16 Stat. 218, as amended, 30 U.S.C. § 52; Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. § 51, also codified at 43 U.S.C. § 661. Section 706(a) of the Federal Land Policy and Management Act of 1976, Pub L. 94-579, 90 Stat. 2743, 2793 (hereinafter "Land Act of 1976"), repealed portions of the Act of July 26, 1866, but left undisturbed the provision of that Act that defers to state law to govern the use of water on the public lands and the lands in the national forest system. See 30 U.S.C. § 51 and 43 U.S.C. § 661, as amended.

³¹ Brief for Petitioner, Cecil D. Andrus, Secretary of the Interior, *Andrus v. Charlestone Stone Products Co., Inc.*, Sup. Ct. Docket No. 77-380, at 17 (hereinafter "Charlestone Br.").

³² This Court has, on at least three occasions, considered this statutory scheme. See *Cappaert v. United States*, *supra*; *Federal Power Commission v. Oregon (Pelton Dam)*, *supra*; and *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). In *Pelton Dam* and in *Cappaert* it was suggested that these statutes only effected a severance of the waters on public lands and not on reserved lands. In light of Congress' 1976 reaffirmation of the application of this scheme to national forest lands (see note 30, *supra*), and the essential purpose of these statutes as emphasized by the Government in its *Charlestone* brief, we believe that *Pelton Dam* and *Cappaert* must be read as holding as follows: *First*, as to public lands, these statutes effected a severance of the waters from the lands, and all water rights, including those of the federal government, have to be perfected under state law. *Second*, as to reserved lands, the water rights of private, municipal and state users are to be determined under state law, but the federal government's reserved rights are

(footnote continued on following page)

In *Charlestone* the Government argues that the decision of the court of appeals in that case³³ "would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States." (*Charlestone* Br. 31) We agree, but find the Government's position there to be irreconcilable with its position in this case. Here the Government argues that private water rights, which have evolved over the last 100 years, should be subjected to an undefined, reserved water right of the United States. (U.S. Br. 30) Although the Government does not address the consequences of its assertion, it follows from the Government's claim for reserved water for the present and future needs (U.S. Br. 17) of the federal forests for "aesthetics, recreation, etc." (U.S. Br. 23), that the very same rights which the Government seeks to preserve in *Charlestone* will be seriously undermined if its position here is accepted.

As we demonstrate in the next section of this brief (see p. 40, *infra*), the Government seeks to support its construction of the Organic Act via an analytic approach that confuses the purposes for which lands in the public domain could be set apart and reserved for national forests with the uses to which the forests would thereafter be put. To

(footnote continued from preceding page)

not subject to state law and enjoy priorities from the dates of reservation. Neither *Pelton Dam* nor *Cappaert* can be read as extending the Government's reserved water right to all uses which may be made of reserved lands. Rather, we submit, a logical reading of these cases suggests that water for the Government's various uses of reserved lands (whether directly or through licensees or permittees) must be perfected under state law and are subject to prior state-perfected rights, but water essential to fulfill the explicit purpose of the reservation enjoys special protection under the Supremacy Clause of the Constitution and the reserved water doctrine. Any other result would endanger water rights that have been perfected under state law in accordance with the federal statutory scheme. See *infra* at 43-50.

³³ 533 F.2d 1209 (9th Cir.), cert. granted, 46 U.S.L.W. 3357 (No. 77-380, November 28, 1977).

accept the assertion that this dichotomy is meaningless is to conclude that the reserved water doctrine is limited only by the ingenuity of the administrators of federal reserved lands, and that is no limitation at all. The Government's novel interpretation of the Organic Act does not justify the expansion of this judicial invention in such a way as to defeat rights which, for the past 100 years, have been perfected under state law, particularly since the federal statutory scheme has deferred historically to state law for the establishment of such rights.³⁴

If, as the Government suggests (U.S. Br. 37), eminent domain is the only other way in which water can be obtained to satisfy every conceivable use of a national forest,³⁵ that is entirely consistent with the constitutional limitations of the Fifth Amendment. As this Court observed in *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945):

The Fifth Amendment, which requires just compensation where private property is taken for public uses, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project.

See also, *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239 (1954). The reserved water doctrine should be appropriately limited by traditional Fifth Amendment considerations and should defer to existing vested rights so long as those rights are not inconsistent with the particular necessity to which the federal reservation is addressed. "The reservation doctrine is a financial doctrine and nothing more."³⁶ As such, it should

³⁴ See note 30, *supra*.

³⁵ Needless to say, the Government has always had the option of perfecting water rights under state law and has often done just that. See A. 106-108.

³⁶ Trelease, *supra* at 147m.

be construed in a manner most consistent with the letter and spirit of the Fifth Amendment.

While the Government relies upon the existence of vested water rights to justify expansion of the reserved water doctrine to defeat such rights and acquire the appurtenant water without compensation (U.S. Br. 30), it offers no reason why such an expansion of the doctrine at the expense of traditional Fifth Amendment notions is warranted. Indeed, the very existence of state-sanctioned, vested water rights created with the blessing of Federal Law is the strongest argument in favor of limiting the reserved water doctrine and requiring the Government to compensate those whose property may be rendered valueless if their water is taken.

An inevitable consequence of the expansion of the reserved water doctrine will be the preference of some water users over others. Western waters are already fully appropriated.³⁷ Thus, if the Government is entitled to reserved water for every national forest use that a Forest Service administrator may deem appropriate, the water to satisfy such bureaucratically sanctioned, new uses must come from some current user. There is no reason why the Government should be allowed to prefer a new water use (e.g., water for a resort hotel) over a water use which has been perfected for 60 years³⁸ (e.g., water for mining and milling).³⁹ Nor, for that matter, is there any reason why

³⁷ See Trelease, *supra* at 33.

³⁸ The likelihood that this example could, in fact, occur, is suggested by the Government itself. (U.S. Br. 50) See also Trelease, *supra* at 122.

³⁹ Economically, such a reallocation of rights is counterproductive. In New Mexico, for example, virtually all surface waters are fully appropriated and the creation of a new use must be at the expense of, or through the purchase of, water rights of an existing user. A misallocation of resources occurs to the extent that the party who loses water rights is not compensated, since the party who gains the rights is paying less than the true cost of undertaking the activity. This encourages the less than optimum use of water by the party gaining the right—in this case the Government. Trelease, *supra* at 153-154.

a hotel within the borders of a national forest should be preferred over a hotel located downstream from the forest.

Here, for instance, the Government argues that it is entitled to reserved water rights for recreational purposes. (U.S. Br. 23) Yet, the national forests were designed to foster the economic development of the West; they were not reserved as recreational sites to the exclusion of their use by timber and mining interests.⁴⁰ True, the forests could be used for recreational purposes, but mining was expressly contemplated as a national forest use, and the Organic Act incorporated specific provisions regarding the use of national forests by miners. 16 U.S.C. §§ 477, 478, 481, 482. The Government now prefers recreational uses to mining ones. The hiker, the fisherman and the sportsman, all enjoy the use of our national forests, and all presently coexist with the miners and other economic users of the forests. But recreation does not stop there. Recreation encompasses ski resorts, hotels, man-made lakes, "etc.". By invoking the reserved doctrine in this fashion, the Government can subjugate one use to another, notwithstanding that the subjugated user may have perfected its rights under state law.

Nothing less than a direct Congressional command, and then only one consistent with traditional constitutional requirements, should serve as the basis for the application of the reserved water doctrine. While it is true, as this Court observed in *Cappaert*, that Congressional "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created," 426 U.S. at 139, those purposes must be interpreted in a manner which is not only consonant with the statutory scheme creating the reservation, but essential to that scheme. To permit anything less than a showing of

⁴⁰ See *infra* at 33-34.

essential necessity to fulfill the explicit purpose of the reservation would allow the Government to exercise carte blanche—without any rhyme or reason it could prefer one use over another.

II. The Organic Act, by defining the purposes for which lands may be withdrawn from the public domain and set aside as forest reservations, limits the reserved water rights of the Government on forest lands to such waters as are essential for the preservation of forest timber and the maintenance of the forest as a watershed regulator.

A. The Statutory Text.

Our analysis of the Organic Act begins with the relevant language of the statute itself.

No national forest shall be established, except to improve and protect the forest within the boundaries, **or** for the purpose of securing favorable conditions of water flows, **and** to furnish a continuous supply of timber for the use and necessities of citizens of the United States

16 U.S.C. § 475 [emphasis supplied].

The Government maintains that the Organic Act empowered the Executive to reserve public lands for national forests if the reservation served any one of three purposes: to improve and protect the forest; **or** to secure favorable conditions of water flows; **or** to furnish a continuous supply of timber. (U.S. Br. 12) The text of the Act, however, does not support such a reading. One can reach that conclusion only if one ignores the placement of commas in the statute and disregards the alternate use of conjunctive and disjunctive connectors. In a word, the Government reads "**and**" as if it were "**or**".

The statute, as actually written, provides that a national forest can be created if one of two dual purposes are served: either

- 1) "to improve and protect the forest," and "to furnish a continuous supply of timber";

or

- 2) "for the purpose of securing favorable conditions of water flows," and "to furnish a continuous supply of timber".

By its literal terms the statute requires timber supply as a necessary element of any forest reservation.

While our reading, as opposed to the Government's, is faithful to the words used and the grammatic structure of the sentence Congress wrote, we recognize that the law as written conflicts with the common Congressional understanding of the 1890's that national forests should be reserved for the important purpose of preserving western watersheds (*see* U.S. Br. 39), even where the trees were of no value as timber.

There can be no dispute that watershed management was perhaps the most important objective of the Organic Act. Congress intended that forest reservations be established at the headwaters of the various rivers in the West because the forest cover would reduce the severity of spring floods and thereby ensure a more uniform supply of water to western users. The trees on reservations in the high peaks of the Rockies were of no value as timber, however, due to their remote location and sparse growth. The creation of these forests reserves, while critical to an effective program of watershed management, would not serve "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." As one Congressman explained in the floor debate immediately preceding passage of the Organic Act:

The reservations that have been established in my state and in most of the Rocky Mountain States are in high altitudes from 8,000-11,000 feet above the level

of the sea. They were selected in high altitudes because there only will shade prevent the melting of snow until mid-summer, when water is needed for irrigation. Everyone understands that large trees cannot grow in high altitudes, and hence it is absurd to contend that these lands even if they were accessible would be taken up for the value of timber that is upon them.

30 Cong. Rec. 983-84 (1897) (Rep. Shafroth).

It is, therefore, clear that the words of the statute as written are an inadequate guide to Congressional intent. Since it is undisputed that Congress did not intend by passage of the Organic Act to preclude the establishment of forest reserves having no timber producing potential, but which were critical to the demands of watershed maintenance, we must turn our attention to the legislative history of the Act in order to learn what Congress actually intended when it enacted 16 U.S.C. § 475.

B. The Legislative History.

As opposed to the confusion inherent in the statutory text, the legislative history materials reflect a consistent understanding from the time the original version of the Organic Act was introduced in 1892⁴¹ until its passage five years later. The Government is less than candid in suggesting that the legislative history of that statute is unclear. (U.S. Br. 51) Petitioner's brief ignores Congressional sources and relies instead on an assortment of administrative manuals regarding the uses of national forests, which the Government invites this Court to weigh as if they were interpretations of the Organic Act itself. (U.S. Br. 44-49) By focusing, instead, on the legislative history materials it becomes clear that the Congressional purpose was unambiguous. What Congress intended was to limit the purposes for which lands could be withdrawn from the public domain and set apart as federal forest

⁴¹ S. 3235, 52d Cong., 1st Sess., 23 Cong. Rec. 4887 (1892).

reservations to just two: namely, preservation of forest timber and the maintenance of the forest as a watershed regulator.

By Section 24 of the Act of March 3, 1891 (hereinafter "Creative Act"),⁴² the President was empowered to set aside lands "wholly or in part covered with timber or undergrowth, whether of commercial value or not" as forest reservations. The Creative Act set no limits on the power of the President to establish forest reservations, and did not provide for the administration and use of these reserves.⁴³

Beginning in 1892, a series of bills were introduced to remedy the deficiencies of the Creative Act. The proposed legislation defined the authority of the President to withdraw lands from the public domain as forest reserves and established a regulatory scheme to govern the use of the national forests. The proposals did not

increase the [President's] authority over the forests, but on the contrary, further restrict[ed] it by declaring the purposes for which reservations may be made.

25 Cong. Rec. 2374 (1893) (Rep. McRae).

⁴² 26 Stat. 1095, 1103, as amended, 16 U.S.C. (1970 ed.) § 471, repealed by Section 704(a) of the Land Act of 1976, 90 Stat. 2792.

⁴³ While the objects of the Creative Act were not explained in the statute itself, it was understood that these objects were

first and foremost of economic importance, not only for the present but more specifically for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purposes of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction.

REPORT OF THE CHIEF OF THE DIVISION OF FORESTRY, H.R. Ex. Doc. No. 1, Part 6 (Report of the Secretary of Agriculture), 52d Cong., 1st Sess. 224 (1892).

Although the various bills reflect minor differences in the language regarding the purposes for which lands could be withdrawn from the public domain and set apart as national forests,⁴⁴ the statement's of the legislation's supporters reflect a clear, continuing and unchanging understanding of the intent of the proposals. In 1892, for instance, the

⁴⁴ For example, Rep. McRae, the leading proponent of the legislation in the House, introduced a version which would have provided:

That the objects for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be *to protect and improve the forests for the purpose of securing a continuous supply of timber for the people and securing conditions favorable to water flow.*

H.R. 119, 54th Cong., 1st Sess., 28 Cong. Rec. 6410 (1896) [emphasis supplied.] The failure of Congress to adopt this version does not indicate that the phrase "improve and protect", as used in the act as passed, should be accorded broad and independent meaning. The legislative history does not reveal why this version was rejected in favor of the one ultimately enacted. Indeed, Rep. McRae himself had previously sponsored a version similar to the enacted statute which provided:

That no public forest reservations shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.

H.R. 119, 53d Cong., 1st Sess., 25 Cong. Rec. 2371 (1893). When asked about the purposes for which national forests could be created under this bill, Rep. McRae stated that:

The bill authorizes the President to establish forest reservations, and to protect the forests 'for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people.'

25 Cong. Rec. 2375 (1893). He attributed no broad and independent significance to the phrase "improve and protect the forest." Rather, his statement suggests that the language of the Organic Act has no different meaning than his 1896 version.

Senate Report explaining an early Senate version of the Act, S. 3235, emphasized:

That the object of the public forest reservations is twofold, namely, to maintain desirable forest conditions with regard to water flow, and, at the same time, to furnish material to the communities in their neighborhood.

S. Rep. No. 1002, 52d Cong., 1st Sess. 10 (1892). The report further emphasized that the proposals were not designed to foster conservation for conservation's sake alone.

Since these forest reservations are not to be in the nature of parks, they are to remain open to public use and entrance for all purposes, excepting so far as restrictions appear necessary in order to protect the property from damage and depredation. Prospecting and mining are to be permitted under proper regulations.

Id. at 12.

This theme continued in 1893. The Report interpreting the House version of the legislation explained:

These reservations are not, to be sure, in the nature of parks set aside for nonuse, except to satisfy pleasure and curiosity. They are established solely for economic reasons.

It becomes, therefore, necessary, also, to prescribe the manner and methods by which the timber growing thereon, the mineral contained therein, the water powers furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which these reservations have been made, namely, to secure such forest conditions as are necessary to preserve an even water flow.

H.R. Rep. No. 2437, 52d Cong., 2d Sess. 2 (1893). This same litany was recited by Congressman McRae. See 25

Cong. Rec. 2375 (1893). In his view the proposed legislation was not intended to preserve forests to the exclusion of the economic development of the West. It was, in fact, an economic development act:

I would not consent to have 17 million acres of public domain dedicated as a park upon which our citizens could not go, upon which no miner could prospect, and no herdsmen [*sic*] could carry his flock. No, I want the forest utilized for all legitimate purposes not inconsistent with the promotion of the growth of the timber cover. Let prospectors, miners, farmers, herdsmen, and all American citizens, under proper restrictions, enter and labor, do their mining, cutting that timber which is authorized to be cut, and no other.

25 Cong. Rec. 2433 (1893).

The Government ignores the existence of other statutory schemes under which the Executive could reserve lands to preserve sites of recreational, historic or scientific interest.⁴⁵ Such was not the purpose of the Organic Act. As Congressman McRae stated:

We are not dealing with parks, but forest reservations, and there is a vast difference.

25 Cong. Rec. 2375 (1893).

The Act, as a measure to preserve the forests for the economic development of the West, gained further support in 1894. The bill as originally reported from the House Committee "was exceedingly objectionable to all the Repre-

⁴⁵ See, e.g., Act for the Preservation of American Antiquities, 34 Stat. 225, 16 U.S.C. § 431 *et seq.*; National Trails System Act of 1968, 82 Stat. 919, 16 U.S.C. § 1241, *et seq.*; Wild and Scenic Rivers Act of 1968, 82 Stat. 906, 16 U.S.C. § 1271 *et seq.* In addition, Title 16 of the United States Code includes innumerable special acts of Congress creating national parks and recreation areas.

sentatives from the West," 27 Cong. Rec. 110 (Rep. Hermann), among other things because it "denied the mining of the mineral land—prospecting and development of the mineral resources of the country—which may be contained in the forest reservations or in any of the timber lands outside of them." *Id.* These objections were met by amendments which permitted miners to enter upon the reserved lands subject to safeguards prescribed by the Secretary of the Interior. The amendments also empowered the President to withdraw from forest reserves those lands which were more valuable for their mineral content. *Id.* at 110-11. These important accommodations to the mining interests of the West did not alter the central purpose of the legislation. The bill still served two principal objectives:

the protection of the forests against destruction by fire or by ax and the preservation of such forests upon which water conditions and water flow are said to be dependent.

Id. at 111.

At the next session of Congress, the House Committee on Public Lands issued a report which essentially mimed past statements regarding the purposes for which forest reserves could be created. See H.R. Rep. No. 1593, 54th Cong., 1st Sess. 3 (1896). Significantly, the Report also emphasized that forest

reservations are not in the nature of parks set aside for non-use, but they are established solely for economic reasons.

*Id.*⁴⁶ Although the Government suggests that the national forests were established with a view towards recreation

⁴⁶ A substantially identical statement appeared in an earlier House Report. See H.R. Rep. No. 2437, 52d Cong., 1st Sess. 2 (1893).

and wildlife preservation at the expense of the economic development of the West (U.S. Br. 46-50), the legislative history of the Organic Act, which the Government's brief ignores, squarely rebuts this suggestion.

The Organic Act came within a short distance of adoption in prior sessions of the Congress,⁴⁷ but the final impetus for enactment came on February 22, 1897, with President Cleveland's reservation, by executive proclamation, of over 21 million acres of new national forests.⁴⁸ This executive action more than doubled the acreage of the national forests. As a consequence, all persons, including those settlers and miners already on these lands, were precluded from using the forests for any purpose. Indeed, under the executive proclamation the cutting of timber was a crime. Accordingly, these new reservations aroused the hostility of many western senators and representatives.⁴⁹ Some perhaps overstated the case in characterizing the President's action as "the most barbarous outrage that has been perpetrated in the last half century." 30 Cong. Rec. 1281 (Sen. Stewart). The Senator from Utah was more precise in his criticism:

[W]e are having withdrawn by Executive order all the desirable portions of the State not already settled. There is no opportunity there for further enlargement of civilization by the establishment of agriculture or mining.

⁴⁷ Versions of the Organic Act passed both the House and the Senate in the third session of the 53d Congress (1894-1895), but the conference report was blocked on the floor of the House and the bill failed in one of the last days of the session. 27 Cong. Rec. 3248 (1895). The bill passed the House in the first session of the 54th Congress, 28 Cong. Rec. 6411 (1896), but no action was taken in the Senate.

⁴⁸ J. ISE, *THE UNITED STATES FOREST POLICY* 129 (1920).

⁴⁹ Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat. Resources Law. 503, 504 (1974); Ise, *supra* at 129.

30 Cong. Rec. 1281 (Sen. Cannon).⁵⁰

President Cleveland's order stimulated Congressional action. The Organic Act—legislation which restricted the President's free hand and specified the purposes for which national forests could be created—was finally adopted on June 4, 1897. The President was no longer empowered to "set apart and reserve . . . public land bearing forests . . . whether of commercial value or not . . . as public reservations."⁵¹ Now, public lands could be withdrawn for national forests only if the precise objectives of the Organic Act were met. While the text of the Act is ambiguous as to those purposes, the legislative history is not:

Mr. Smith (Arizona): What is the purpose of the reservation?

Mr. McRae: To conserve the water flows, and to furnish a continuous supply of timber for the people.

30 Cong. Rec. 967 (1897).⁵²

Furnishing "a continuous supply of timber for the people," is self-explanatory. Congress was concerned that the unregulated cutting of trees in our nation's forests would lead to a situation where there was no timber left for use

⁵⁰ Other senators and representatives expressed similar statements of hostility. *See, e.g.*, 30 Cong. Rec. 901, 1284 (Sen. Pettigrew); 30 Cong. Rec. 902 (Sen. Carter); 30 Cong. Rec. 909-910 (Sen. Wilson); 30 Cong. Rec. 969 (Rep. Knowles).

⁵¹ Creative Act.

⁵² The Congressional Record of the 55th Congress, first session, is replete with similar statements of the bill's objective. *See, e.g.*, 30 Cong. Rec. 966 (Rep. McRae) ("protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent"); 30 Cong. Rec. 986 (Rep. Bell) ("these reservations are not forest reservations for the sake of the forests. They are reservations to promote the water supply to the farms in the valleys below."); 30 Cong. Rec. 987 (Rep. Jones of Washington) ("conserve our timber supply" and protection against floods); 30 Cong. Rec. 1007 (Rep. Ellis) ("preserve . . . the water supply.")

in connection with the future development of the nation. "Conserve the water flows" has an equally specific meaning: ensuring a uniform supply of water to be used in the economic development of the largely arid western lands.

[F]orests exert a most important regulating influence upon the flow of rivers, reducing floods and increasing the water supply in the low stages. The importance of their conservation on the mountainous watersheds which collect the scanty supply for the arid regions of North America can hardly be overstated. With the natural regimen of the streams replaced by destructive floods in the spring, and by dry beds in the months when the irrigating flow is most needed, the irrigation of wide areas now proposed will be impossible, and regions now supporting prosperous communities will become depopulated.

S. Doc. No. 105, 55th Cong., 1st Sess. 10 (1897). Conserving the water supply was not intended to encompass minimum instream flows for the improvement of fish and wildlife habitat, fire prevention, "aesthetics, recreation, etc." (U.S. Br. 23) Congress did not intend, by the phrase "favorable conditions of water flows," to mandate a system of water rights under which the Government would be entitled to the riparian rights of "natural" (U.S. Br. 30) stream flows in derogation of the western system of prior appropriation. It intended rather to maximize the water available for beneficial economic use by maintaining the western watersheds.

The Government contends that the "improve and protect" language of the Organic Act, standing alone, constitutes a purpose the accomplishment of which, without more, may serve as a basis for executive action removing land from the public domain for national forests. (U.S. Br. 27) The legislative history of the Act does not support that contention. Nothing in the legislative history materials indicates that Congress intended to attribute independent meaning to the "improve and

protect" words of the statute. See note 44, *supra*. In our view the phrase is simply precatory, and was used for the purpose of ameliorating the concerns of those who feared that even under the proposed legislation the timber interests would "steal it all and leave nothing but a naked wilderness." 27 Cong. Rec. 111 (Rep. Wells) (1894). As recently explained by the Fourth Circuit,

[f]rom its initial settlement and continuing throughout the greater part of the nineteenth century, the nation's forest lands were wastefully exploited. . . . By the late nineteenth century responsible leaders, both in and out of Government, had become so alarmed that they warned the Congress and the country against the immediate and long range effects on both water flow and timber supply which would inevitably result if the irresponsible and profligate timber practices were permitted to continue.

. . .

This legislative history demonstrates that the primary concern of Congress in passing the Organic Act was the preservation of the national forests.

West Virginia Div. of Izaak Walton League v. Butz, 522 F.2d 945, 950, 952 (4th Cir. 1975). Thus, the phrase "improve and protect" speaks to the general concern that the forests be preserved; a concern that involved the subject of forest management rather than forest creation. The language complimented and reinforced the provisions of the Organic Act which specifically dealt with the power of the Executive Branch to control forest use. See 30 Stat. 35, as amended, 16 U.S.C. (1970 ed.) § 476, repealed by Section 13 of the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2958.

At any rate, whatever meaning is to be ascribed to the "improve and protect" language must be consistent with the overall legislative history of the Organic Act. Recalling that Congress was outraged that under the Creative Act President Cleveland could withdraw public lands from fur-

ther use in the economic development of the West (*supra* at 35-36), it is beyond contention that the Organic Act was designed to limit the President's unbridled discretion and to preserve the forests for economic development. As such, "improve and protect" cannot mean that the President was suddenly invested with the same broad discretion which the Congress sought to restrain. The language cannot serve as a basis for conserving the forest waterways for conservation's sake alone at the expense of the private, municipal, and state users of water.

Consistent with the legislative history of the Act, "improve and protect" might serve to modify the specific purposes for which national forests could be reserved from the public lands. Fire protection, flood control, erosion protection, all would seem consonant with and, perhaps, even necessary adjuncts of, timber preservation and securing favorable conditions of water flows. While it is conceivable that "improve and protect" may have been designed to modify and insure a flexible interpretation of the explicit purposes for which forests could be reserved, it is inconceivable that this language could serve as an independent, essentially undefined and unrestrained basis upon which the President could withdraw lands from the public domain.⁵³

⁵³ An analysis of the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 *et seq.*, confirms that Congress understood that the purposes for the establishment of a national forest under the Organic Act were limited to watershed management and timber preservation. The statute states that its outdoor recreation, fish and wildlife purposes are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in Section 475 of this Title." This language would be superfluous if, as the Government argues here, a national forest could have been set up under the Organic Act for fish, wildlife or recreation purposes. The legislative history of the 1960 Act likewise supports the conclusion that Congress understood that the purposes for which a national forest could be created under the Organic Act were limited to watershed management and timber conservation. See, e.g., 106 Cong. Rec. 11697 (1960) (Rep. Colmer); 106 Cong. Rec. 11706 (1960) (Rep. Van Zandt); 106 Cong. Rec. 11717 (1960) (Rep. Miller).

Finally, the Government seeks to bolster its interpretation of the Congressional intention underlying the Organic Act by confusing the purposes for which the President can withdraw public lands with the uses to which those lands subsequently can be put. (U.S. Br. 44-53) We agree that the use-purpose distinction is not significant in the administration of the national forests. However, as the legislative history of the Organic Act demonstrates (*see supra* at 32-35), the distinction is vital when dealing with the subject of forest creation. Furthermore, the Government never explains why the reserved water doctrine should be expanded to encompass every conceivable forest use sanctioned by the Forest Service.⁵⁴ We find no support for that position in the cases applying the reserved water doctrine. Rather, we submit that the case law demonstrates that reserved water rights must be founded on a clear statement of Congressional intent. Here the legislative history of the Organic Act limits that intent to timber preservation and watershed maintenance. The case law and legislative history rule out reserved water rights for every use which an ingenious forest administrator may conjure up.

⁵⁴ The absurdity of the Government's argument is underscored by the many and diverse uses made of forest lands. In the early part of the century permits were issued for the following forest uses:

Agricultural, apiaries, cabins, dipping vats, gravel, hay cutting, hotels and road houses, lime kilns, pastures, railroads, residences, resorts, saw mills, slaughterhouses, stage stations, stores, tramways (aerial), telegraph lines, telephone lines.

U.S. Department of Agriculture, Forest Service, *THE NATIONAL FOREST MANUAL, SPECIAL USES 7* (1908).

Permission by the Forest Service to carry on activities such as slaughterhouses or dipping vats cannot mean that the national forests were created to serve these purposes, and that such activities carry with them rights to reserved water.

III. The Government must prove that the reserved water rights it seeks are essential for the preservation of the forest as a timber resource and watershed regulator.

Contrary to the impression sought to be conveyed by the Government (U.S. Br. 30), the issue is not verdant forests versus arid deserts. The Government may, in an appropriate case, establish that it is entitled to reserved water for national forest purposes by proving that the water sought is essential to fulfill the forest's role as the regulator of the watersheds and as the supplier of timber. In this case petitioner has made no such showing. Beyond that, the Government never even suggested at the trial of this case that the flora and fauna in the Gila National Forest were not getting sufficient water, and its brief does not refer the Court to any scientific authority which supports that proposition.

The Government now claims that minimum instream flows are necessary for erosion control, fire prevention, watershed protection, maintenance of "natural" flows downstream, wildlife habitat protection, preservation of fish, stockwatering, aesthetics and etc. (U.S. Br. 22-23, 57) To begin with, the Government made no attempt at trial to relate any of these water uses to the statutory purposes of timber preservation and watershed maintenance. The only *proof* which the Government offered at trial was that minimum instream flows were necessary to preserve a particular species of fish. (A. 88-89) Unlike the "pup fish" in *Cappaert*, the Government did not show, or even attempt to show, that the preservation of Gila trout was one of the statutory purposes for which the federal reservation was created.

Whether water is actually needed to fulfill the purposes of the federal reservation, in this case watershed management and timber preservation, is always a question of fact.

If, for example the Government *proves* that certain minimum instream flows are necessary to keep timber-producing trees from dying, or that erosion of the soil will result in spring floods unless certain water levels are maintained, then it will have made a *prima facie* case supporting a claim for reserved water. Conceivably, the Government might be able to establish that animal watering facilities are essential to the survival of wildlife which consumes destructive insects infesting the timber. Water for this purpose would also satisfy the statutory test.

Rather than relying upon record evidence supporting the need for minimum instream flows, the Government offers the Court only the hypothetical concern that if upstream appropriators remove a substantial amount of water from the Rio Mimbres "the instream flow in the forest below can be reduced to the point of injuring the land and life of the forest." (U.S. Br. 30) No such injury could possibly occur to the forest bordering the Mimbres because there are no upstream appropriators. (A. 109)⁵⁵ As a practical matter, therefore, the Government is already receiving all of the water it will ever receive from the Mimbres; nothing that this Court could do would turn the Gila National Forest into, or keep the forest from becoming, a barren wasteland.

There is little likelihood, moreover, that wildlife or plantlife will be deprived of water in other national forests. Virtually all of the streams in the Rocky Mountains are fully appropriated,⁵⁶ yet the streams continue to flow through the national forests. That the forests continue to

⁵⁵ While downstream appropriators could apply to transfer their points of diversion to locations upstream from the forest, such transfers are not automatic under New Mexico law. The applicant must receive approval of the State Engineer's office and cannot impair the rights of downstream users. N.M. Stat. Ann. §§ 75-5-22, 75-5-23. See *supra* note 15.

⁵⁶ See Trelease, *supra* at 33.

flourish bears testimony to the effective, and century-old scheme of private appropriation through state regulation. This Court should be loathe to jettison that salutary system.

IV. The Government may not invoke the doctrine of reserved water rights incident to federal forest reservations against miners on patented lands who have perfected their water rights under state law and have developed their claims in reliance on their patents and water permits.

A. Introduction.

Though not directly at issue in the case at bar, we are concerned that a decision in favor of petitioner, no matter how narrowly framed, will be seized upon by the Government for use against all water appropriators, including miners, located upstream from federal forest reservations. We submit that a decision protecting the rate of water flow the Government seeks in the Rio Mimbres should not control in a case in which the Government asserts a similar claim against an upstream mine, operating on patented lands, which has perfected its water rights under state law, has used those waters for nearly 60 years, and has invested substantial sums in reliance on its federal patent and state water permit. Accordingly, we respectfully urge that if the Court reverses the judgment below, it indicate in its opinion either that the reserved water rights of the United States incident to federal forest reservations cannot be used to interfere with water rights perfected in accordance with state law by mining operations, or, alternatively, that the subject of the relative water rights of the United States vis-a-vis miners remains open.

B. Federal Law Encourages the Use of National Forest Reservations for Mining and Provides that State Law Shall Govern the Water Rights of Miners.

Although Section 9 of the Act of February 27, 1865, 13 Stat. 440, implied a license for miners to go upon federal lands and extract minerals within the forest, the Act of July 26, 1866, 14 Stat. 251, as amended, 30 U.S.C. § 22 *et seq.*, specifically declared, for the first time, that the mineral lands in the public domain were "free and open to exploration and occupation."⁵⁷ The Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. § 22 *et seq.*, was the first comprehensive federal mining code. The basic policy of the 1866 Act of "free and open mining" was continued; the 1872 Act provided that all valuable mineral deposits in the lands owned by the United States were open to entry and development.⁵⁸ The Act further set forth, with considerable specificity, the manner of locating claims, the procedure for obtaining patents to claims, and the rules relating to assessment and discovery work required to validate claims.

The Organic Act, which authorizes the withdrawal of forest lands from the public domain, provides that such withdrawals do not foreclose access to forest reserves by miners. *See* 30 Stat. 34-36, 16 U.S.C. §§ 477, 478, 481, 482.

⁵⁷ The 1866 statute authorized the location and patent of lode or vein claims. In 1870 placer claims were also made subject to location and patent. Act of July 9, 1870, 16 Stat. 217, as amended, 30 U.S.C. § 35.

⁵⁸ By the Mining and Minerals Policy Act of 1970, 84 Stat. 1876, 30 U.S.C. § 21(a), Congress further defined national policy on mineral development, stating that "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs"

The Organic Act specifically provides that nothing in the statute is intended to prohibit any person from entering the forests for the purpose of "prospecting, locating and developing the mineral resources thereof." 16 U.S.C. § 478. It further provides that the mineral lands in forest reserves were to remain subject to entry under the existing federal mining laws. 16 U.S.C. § 482.⁵⁹ As recognized by the Forest Service in 1974 in regulations issued concerning the use of surface lands of the national forest system by persons operating under the mining laws,

prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897 [the Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production. Exercise of that right may not be unreasonably restricted.

39 Fed. Reg. 31317.

Having opened the public domain and later the national forests to miners, Congress, "recogniz[ing] the critical role of water in mining operations" (*Charlestone Br.* 14), enacted a series of statutes pertaining to the miners' use of water. Rather than adopt a federal code, Congress chose instead "to ratify the rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining." *Id.* *See also id.* at 19. Thus the federal mining laws have always "provided separately for the right to mine valuable minerals and for the acquisition of water rights." *Id.* at 14.

⁵⁹ *See also* Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959; Act of February 1, 1905, 33 Stat. 628, as amended, 16 U.S.C. § 524; and Sections 501 and 701 of the Land Act of 1976, 90 Stat. 2776, 2786, which provide for the grant of rights-of-way across national forest lands for conduits used to carry water to mine and mill sites.

In Section 9 of the 1866 Act Congress declared that

Whenever, by priority of possession, rights to the use of water for mining . . . have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same

14 Stat. 253, as amended, 30 U.S.C. § 51, also codified at 43 U.S.C. § 661. The same approach was followed in Section 17 of the Act of 1870, which provided that "[a]ll patents granted . . . shall be subject to any vested and accrued water rights . . . as may have been acquired under or recognized by" Section 9 of the 1866 Act. 16 Stat. 218, as amended, 30 U.S.C. § 52. The Act of 1872 did not disturb the water rights provisions of the earlier statutes. *See* §§ 9 and 10 of the Act of May 10, 1872, 17 Stat. 94.

As the Government explains in its *Charlestone* brief, the decisions of this Court make it clear that those statutes express "Congress' intention to allow state and local laws to govern the acquisition of water rights on the public domain, for purposes including but not limited to mining." (*Charlestone* Br. 16) *See Atchison v. Peterson*, 87 U.S. (20 Wall.) 507 (1874); *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670 (1874); *Jennison v. Kirk*, 98 U.S. 453 (1878); *Broder v. Water Co.*, 101 U.S. 274 (1879); *Sturr v. Beck*, 133 U.S. 541 (1890); *San Jose Land & Water Co. v. San Jose Ranch Co.*, 189 U.S. 177 (1903); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). *See also Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967). Thus, federal law has always governed the grant of land patents, but state and local law has always governed the acquisition of water rights.

Various other public land statutes "followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights

on public lands." (*Charlestone* Br. 20) *See, e.g.*, the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321;⁶⁰ and the Taylor Grazing Act of 1934, 48 Stat. 1270, as amended, 43 U.S.C. § 315b.⁶¹ Most significant for our purposes is that portion of the Organic Act, 16 U.S.C. § 481, which provides:

All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

Though Congress repealed parts of 30 U.S.C. § 51 and 43 U.S.C. § 661 by Section 706(a) of the Land Act of 1976, 90 Stat. 2793, it continued the system of state law control of water rights (*see* Sections 701 and 706(a), 90 Stat. 2786, 2793), and, as previously noted (*supra* note 30), specifically preserved 16 U.S.C. § 481 and the rule that state law governs the use of water on national forest lands.

C. The Government May Not Invoke its Reserved Water Rights Against Miners Operating Patented Claims Who Have Perfected their Water Rights Under State Law.

As a consequence of the foregoing statutory scheme, as construed by the decisions of this Court, miners have en-

⁶⁰ "[A]nd all surplus water over and above such actual appropriation and use [for irrigation], together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing right."

⁶¹ "[N]othing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law."

tered upon the public lands of the United States, including national forests, and have invested countless dollars to develop their claims and bring forth the mineral resources located therein. In so doing, pursuant to the mandate of federal law, they have secured the water necessary for their operations in accordance with the provisions of state law. Ignoring that statutory scheme, and with total disdain for the vested interests at stake, the very same sovereign which granted the miners their patents and told them that their water rights would be protected by state law, now contends that it may deprive them of the water necessary for their survival. To add injury to insult, the Government even eschews traditional concepts of fair compensation for property rights destroyed and invokes the judicial invention of senior water rights implied from the reservation of the forest lands.

Acceptance of the Government's position "would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States." (*Charlestone Br.* 31. *See also id.* at 13.) Of more immediate concern to this *amicus* is the impact such a ruling would have on its established mining interests totalling \$140 million in capital investment.

Examine for a moment the potential plight of MolyCorp (or any other similarly situated mining operation). In 1920, long before the concept of reserved water rights was applied to federal forest reservations, the company began to develop the Questa Mine. Today, some 58 years later, it has invested \$125 million in developing the open pit mine. Another \$15 million has recently been spent to prepare for the expansion of existing operations. MolyCorp holds federal patents to claims covering thousands of acres of land that were originally part of the Carson National Forest. In order to mine those claims, and then mill the resulting ore, MolyCorp is dependent upon the availability of

significant quantities of water. As required by federal law, MolyCorp perfected its claims to the waters of the Red River, Columbine Creek and the underground Rio Grande basin pursuant to state law, receiving its first permit in 1922. Yet, notwithstanding these vested interests and the company's reasonable reliance on the provisions of federal and state law concerning water rights, the Government now contends that, even without compensating MolyCorp, it has the power to deprive the Questa Mine of the water it has been using for nearly 60 years.

We submit that, even if the Court agrees with the Government that under the Organic Act it is entitled to reserved water rights for all uses to which the national forests can be put, in view of the federal statutory scheme outlined above, the Court should hold that the reserved water doctrine may not be invoked by the Government as against miners operating on patented lands in national forest reserves who have perfected state water claims and were actually using the waters at issue for mining, milling and related purposes before the assertion of the federal reserved water rights.

Our conclusion is supported by our analysis of the reserved water doctrine (*supra* at 15-27)⁶² and by principles of equitable estoppel.

While we recognize that a claim of equitable estoppel ordinarily does not lie against the sovereign, *United*

⁶² We do not read *Federal Power Commission v. Oregon (Pelton Dam)*, *supra*, nor *Cappaert v. United States*, *supra*, as holding to the contrary. To begin with, the former does not involve a Government claim to reserved water rights. *See supra* note 32. Moreover, neither case involved a contest between the reserved water rights of the federal government and the state water rights of miners holding federal patents. This Court did not have occasion to consider the impact of the federal mining statutes and patent system on such contests.

States v. Utah Power & Light Co., 243 U.S. 289 (1917),⁶³ the circumstances here present fully support the application of that doctrine to the Government's assertion of reserved water rights against miners such as Molycorp. See *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States v. Lazy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973); *United States v. Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

The predicament of Molycorp, and all similarly situated miners, raises factual issues similar to those involved in *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), wherein the court held:

Here the acts of the Secretaries of the Interior were in strict conformity with the will of Congress as expressed in two separate Acts of Congress. Relying upon the Acts of Congress, and the grants issued to it under such Acts by the administrative officer designated in the Act to make such grants, defendant expended something in excess of \$250,000. Clearly the plaintiff is estopped to question the validity of these grants.

Id. at 474. Accord, *Shell Oil Co. v. Kleppe*, 426 F. Supp. 894, 902 (D. Colo. 1977).

By raising, at this late date, the doctrine of reserved water rights, the Government effectively seeks to deny its own statutes and patents and to render worthless years of reliance and billions of dollars of investment capital expended by the nation's miners. We have, therefore "a clear case for the application of equitable estoppel against the government." *Id.*

⁶³ Molycorp does not premise its claim of estoppel on either the active misconduct or silence of governmental officials as was the case in *Utah Power & Light Co.* In contrast to defendant's colorable claim to public lands in that case, here Molycorp received federal patents pursuant to federal statutes authorizing its entry on national forest reserves and providing for the patenting of mining claims. See Section 6 of the Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. § 29.

Conclusion

For the reasons advanced in Parts I, II and III, *supra*, and for the reasons advanced by respondent, the judgment of the Supreme Court of New Mexico should be affirmed. Alternatively, if the Court reverses the decision below, for the reasons advanced in Part IV, *supra*, the Court should hold that the Government may not invoke its reserved water rights against miners operating patented claims in federal forest reserves who have perfected their water rights under state law and who were actually using the waters at issue prior to the federal assertion of reserved water rights.

April 3, 1978.

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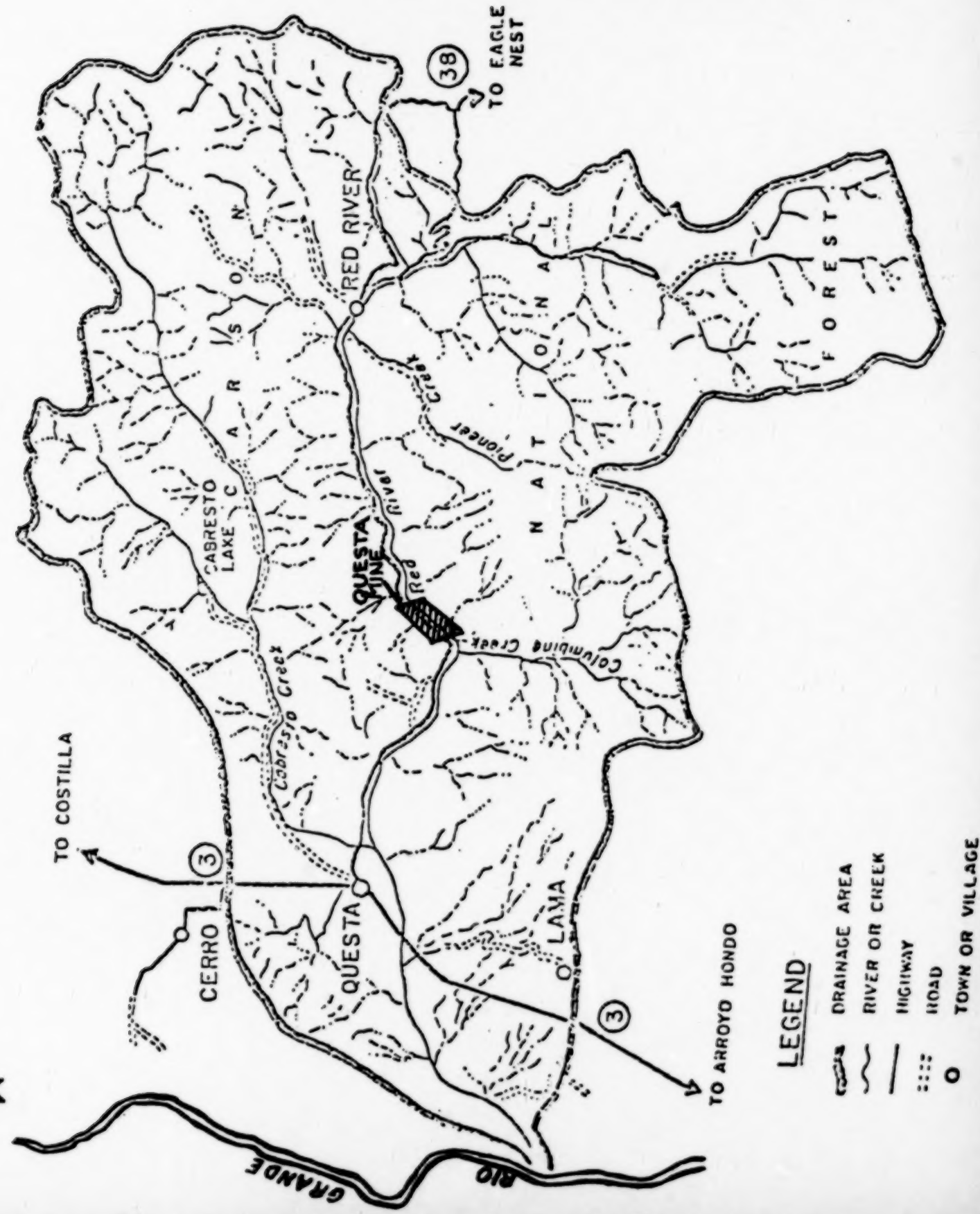
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APPENDIX

DRAINAGE AREA OF RED RIVER AND CABRESTO CREEK

SCALE: 1 inch = 3 miles



FOR ARGUMENT

Supreme Court, U. S.
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MICHAEL RUDAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977
No. 77-510

UNITED STATES OF AMERICA, Petitioner

v.

STATE OF NEW MEXICO, Respondent

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO**

**BRIEF OF AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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BRIEF OF AMICI CURIAE
IN SUPPORT OF RESPONDENT

I. INTEREST OF AMICI

Congress, in 1891, authorized the President to create national forests by means of the reservation of public lands bearing forests. Creative Act of March 3, 1891, 16 U.S.C. § 471 (1970). In the Organic Act of 1897, 16 U.S.C. § 475 (1970), Congress spelled out the purposes for which national forests were to be established and administered. Basically, two purposes were authorized, the protection of the watershed in order to insure dependable water supplies for downstream appropriators, and protection of the forest in order to secure an adequate and continuous supply of timber. These two purposes, unamended

by federal legislation until 1960, are made even more clear by the legislative history of the two fundamental acts.

Despite the clear language of the Organic Act, and its convincing legislative history, the United States claims that the Supreme Court of New Mexico erred in that it misconstrued the statute in denying the government's claims to reserved water rights to minimum streamflows in the Gila National Forest for recreation and fish purposes. Further, the government asserts it is entitled to reserved rights for use by private forest permittees, despite the fact that Congress provided in the Organic Act that all waters within the boundaries of national forests could be used by private appropriators "under the laws of the state wherein such national forests are situated" 16 U.S.C. § 481 (1970).

Similar claims are being made by the United States in litigation pending in other western states. See e.g. *State of Washington v. A and C Grazing Co., et al.*, Okanogan County Superior Court No. 17787. Besides being a vital source of timber, national forest system lands are considered the most important watershed areas under any agency of the United States. In the eleven western states, more than half of the streamflow comes from the national forests. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 211 (1969). Thus, the decision of this Court in the case will have significant ramifications throughout the western states.

The western states joined as *amici* in this brief share the concern for the protection of recreation and environmental values in the national forests espoused by the United States. Moreover, contrary to the cries of alarm sounded by the petitioner, the New Mexico Supreme Court's decision does not preclude both federal and state

initiatives to protect these values through maintenance of minimum streamflows on national forests, nor jeopardize the reserved rights of the United States in national forests throughout the West. But, the determinative issue in this case is the question of for what purposes national forests were to be established and administered according to the Organic Act of 1897. As this Court said recently, "The implied reservation of water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more" *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

The *amici* wish to advise this Court of their position that the purposes for which forest lands could be withdrawn pursuant to the Creative and Organic Acts, did not include recreation and protection of fish and wildlife, as the United States urges, and that therefore the New Mexico Supreme Court's decision should be affirmed.

II. QUESTIONS PRESENTED

1) Whether recreation is among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

2) Whether the Winters or reservation doctrine provides the United States with rights to the use of whatever amount of water that might be needed to serve individuals making private uses of the forest lands as permittees of the Secretary of Agriculture?

3) Whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands

were or could have been withdrawn from the public domain, prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960?

III. SUMMARY OF ARGUMENT

The Gila National Forest lands were withdrawn pursuant to the Organic Administration Act of 1897 for the purposes of securing favorable conditions of water flows below the watershed and to provide a continuous supply of timber. That these were the only purposes for which national forest lands could have been withdrawn under the Organic Act is evident from the language of the Act itself, as well as its legislative history. Forest Service administrators have interpreted the Organic Act consistent with this construction of the purposes for which national forest lands could be withdrawn from the public domain.

The relevant case law also supports the proposition that reserved rights in a national forest arise only for purposes of watershed protection and timber maintenance, prior to enactment of the Multiple-Use Sustained-Yield Act in 1960. The Multiple-Use Act provided for supplemental purposes for national forests, including recreation and fish and wildlife, as of 1960. However, the language of the Act itself and its legislative history make clear that the Act does not provide a basis on which to predicate reserved rights for instream uses on national forests prior to its enactment.

The United States is also not entitled to reserved rights for uses made by private individuals on forest lands. It is clear that use of water by private persons on forest lands is governed by the principles of prior appropriation under state law. Continuing to recognize state laws for private

uses on forest lands will not place an unreasonable burden on federal range management.

New Mexico has suggested several alternatives for the federal government to secure the rights to minimum stream flows which it seeks in this litigation. Furthermore, the New Mexico Supreme Court decision, if upheld, will do nothing to preclude the exercise of state prerogatives under existing laws to maintain minimum flows on forest lands in the West.

Rather than an attempt to ignore environmental values, the New Mexico Supreme Court decision should thus be seen as simply a recognition of the purposes for which forest lands could be withdrawn from the public domain according to the unambiguous language of the Organic Act of 1897.

IV. ARGUMENT

A. The original purposes for reserving Gila National Forest Lands were to secure favorable conditions of water flows below the watershed, and to provide a continuous supply of timber.

1. The language of the Organic Administration Act of 1897 and its legislative history make clear that Congress intended to authorize establishment of national forests only for the purposes of timber management and watershed protection.

The United States asserts in its petition that if the New Mexico Supreme Court's decision is allowed to stand, it "will jeopardize the reserved water rights of the United States in national forests throughout the West." Petition,

p. 6. This statement is completely contrary to the record of this case. From the pretrial conference, New Mexico agreed that the United States "has a right to water under the reservation doctrine to the extent that such right satisfies the purposes for which the federal lands were withdrawn and to the extent that waters were unappropriated and available to be so reserved." (Pre-Trial Order, Tr. 231). Likewise, the New Mexico Supreme Court agreed that the principle of reserved water rights applies to the Gila National Forest Lands. In so doing, the Court cited the recent opinion of this Court in *Cappaert v. United States*, 426 U.S. 128 (1976), in which the Court stated:

"... [W]hen the Federal Government withdraws its land from the public domain and reserves it for a Federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." 426 U.S. at 138.

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the Court concluded:

"the issue is whether the government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created" 426 U.S. at 139

However, as is clearly indicated in this Court's explanation of the reservation doctrine in *Cappaert*, the conclu-

sion that the United States did exercise its powers to reserve waters for the Gila National Forest is only the initial step in the analysis. Mere recognition of the right does nothing to define its scope, as is required by the reservation doctrine. Thus, this Court in *Cappaert* stated further as follows:

"The implied reservation-of-water doctrine, however, reserves only that amount of water to fulfill the purpose of the reservation, no more." *Id.* at 141.

Thus, in order to define the scope of the reserved right as it exists in favor of each reservation, an additional question must be determined, namely, "What are the purposes of the reservation to be served by the reserved right?" The language of the acts under which the Gila National Forest lands were withdrawn, as well as their legislative history, conclusively demonstrates that the Gila National Forest lands could have been withdrawn only for purposes of watershed protection and timber maintenance.

The national forest system was created by Congress in the Creative Act of 1891, 26 Stat. 1103, 16 U.S.C. § 471 (1970). This Act provided in pertinent part:

"The President of the United States may, from time to time, set apart and reserve in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

The Act does not refer to the purposes of the national forests. Nevertheless, the overriding concern for timber management and watershed protection was the focus of the floor debates leading to the passage of the Creative Act. Mr. Flower, a Representative from New York, speaking in favor of passage of the Act stated:

"The more you preserve the timber at the headwaters . . . , the better you will be able to restrain the floods at its mouth and along its banks, and the better you will be able to protect the property of the people living in its fertile valleys.

. . . .These streams someday or other will be diverted from their beds for irrigation purposes, and will make fertile the lands in the Rockies and the Nevadas, besides which it will prevent a great deal of suffering from overflows.

The more careful the preservation of the timber at the fountainheads of the streams, the better it will be for the West and the South and for the people who live in the valleys through which these great rivers flow.

. . . Now, Mr. Speaker, I think that the man who cuts trees on the headwaters of these streams in such a way as to seriously diminish the timber commits a crime against the western farmer." 22 Cong. Rec. 3616 (Feb. 28, 1891).

Because the Creative Act was unclear as to the purposes for which forest reserves could be created, and also failed

to provide a system of administration for the reserves, Congress passed the Organic Administration Act of 1897, 30 Stat. 35, 16 U.S.C. § 475 (1970). Among the provisions of the Act was a clear statement of purposes for which forest reserves could be established:

"No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."

This statement of purposes clearly demonstrates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful supplies of timber therein from destruction. The language is devoid of any reference to recreational, aesthetic, or wildlife or fish purposes. Thus, an objective appraisal of the text of the provisions of the Organic Act does not allow for the broad interpretation espoused by the United States.

Despite the clear limitation of forest purposes found in the provisions discussed above, the United States contends that 16 U.S.C. § 551 indicates that Congress envisioned broader purposes than those stated therein. Originally passed as part of the Organic Act of 1897, 16 U.S.C. § 551 empowers the Secretary of Agriculture to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

As noted previously, one of the major deficiencies of the Creative Act of 1891, which the Organic Act was

designed to remedy, was the former's failure to provide a basis for regulation and administration of forest reserves. Thus, Section 551 authorized rules and regulations to regulate the occupancy and use of the forests and preserve them from destruction. Thus, in order to ensure that the forests achieve their objects or purposes (watershed protection and timber preservation), regulation of the various internal activities in the forests was essential. Otherwise, those activities or uses could interfere with the paramount forest objects or purposes.

Congress surely knew that many uses would and could be made of the forests. Indeed, the Organic Act permitted "... any person [to enter] upon such national forests for all lawful and proper purposes . . ." so long as there was compliance with rules and regulations adopted under 16 U.S.C. § 551. However, Congress at the same time recognized that all *uses* of the forest would need to be regulated to ensure the achievement of the specific statutory purposes of the Organic Act. Consequently, the thrust of 16 U.S.C. § 551 is to regulate forest uses, not to somehow equate forest uses with forest purposes.

The United States also seeks to find support for their interpretation of the Organic Act in its legislative history. However, the congressional debates and committee reports pertaining to the Organic Act support the construction that the purposes of the national forest were envisioned by Congress to be economic rather than recreational or aesthetic. This is clearly displayed in a statement by Representative McRae of Arkansas, who was one of the chief sponsors of the Organic Act. He said:

"The objects for which the forest reservation should be made are the protection of the forest growth against fire and ax, and

preservation of forest conditions upon which water conditions and water flows are dependent. The purpose, therefore, of this bill is to maintain the favorable forest conditions, *without excluding the use* of these forest reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons." 30 Cong. Rec. 966., (May 10, 1897) (emphasis added).

It follows from this statement that recreation, while considered a proper forest use, was clearly rejected by Congress as a forest purpose. The forests were not to be parks set aside for non-use. They were intended to protect the watershed for the benefit of irrigators and other economic users and to preserve a supply of timber. The concept of maintaining minimum streamflows or lake levels to fulfill various non-economic purposes was clearly not intended.

The "Report of the Committee on the Inauguration of the Forest Policy," Sen. Doc. No. 105, 55th Cong. 1st Sess. 1897, also emphasized the functions of the forests as protectors of the watershed and sources of timber supply:

"Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and

general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of western America is dependent upon irrigation." *Id.* at 8.

The United States asserts that the use of the words in the Organic Act "... to improve and protect the forest within the boundaries . . . ," by Congress in its statement of forest purposes, expands the original purposes of the forest beyond those of watershed protection and timber preservation. It contends that this phrase encompasses recreational and other purposes not otherwise explicit in the Act. However, the words of the Act are clear as to the meaning of this phrase. At best, the phrase can be read to relate to the need to regulate and protect the forests in order that they may achieve their purposes as protectors of the watershed and sources of timber supply. Nothing in the Organic Act indicates that the purposes of the forest were to be greater than those. To so construe the cited phrase would expand the meaning of the Act beyond its own limits.

That Congress intended the twin purposes of watershed protection and timber preservation for national forests is further evidenced in the enactment of the Weeks Act of March 1, 1911, ch 186, 36 Stat. 962. The Act authorized and directed the Secretary of Agriculture to:

"... examine, locate, and recommend for purchase such forested, cut-over, or denuded lands within the *watersheds of navigable* streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of

timber" 16 U.S.C. § 515 (1970). (emphasis added)

Later, by the Act of June 7, 1924, 43 Stat. 655, 16 U.S.C. § 570 (1970), Congress authorized the Secretary of Agriculture to ascertain the location of public lands "chiefly valuable for stream-flow protection or timber production, which can be economically administered as parts of national forests" and to report his findings to the National Forest Reservation Commission, which had been established by the Weeks Act. Upon a Commission determination that the administration of said lands by the federal government would "protect the flow of streams used for navigation or for irrigation, or will promote a future timber supply," then the President was to lay the findings of the Commission before Congress for action toward their inclusion in forests. See C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 200-202 (1969). Thus, Congress continued to recognize that the creation and protection of the national forests were solely for the purposes of preserving timber supplies and protecting the watershed for downstream users.

2. *That the Creative and Organic Acts authorized the withdrawal of national forest lands only for purposes of timber management and watershed protection has historically been recognized by forest land administrators.*

Despite the plain language of the Organic Act and its convincing legislative history, the United States contends that the construction of the Act by various administrators indicates that Congress intended broader purposes. It is settled that the practical construction of a statute or act of

Congress, *fairly susceptible of different constructions*, by those charged with the duty of executing it is entitled to great weight. *Eg. Udall v. Tallman*, 380 U.S. 1 (1965); *Zemel v. Rusk*, 381 U.S. 1 (1965). It is submitted, however, that the Organic Act is not fairly susceptible of differing constructions as to the purposes for national forests. Moreover, the administrative construction of the Organic Act supports the decision of the New Mexico Supreme Court, despite the contentions of the United States to the contrary.

Shortly after the passage of the Organic Act, the Department of the Interior, which was given the control of the "forest reserves," promulgated rules and regulations governing forest reserves established under the authority of the Creative Act of 1891. These rules and regulations were promulgated less than a month after passage of the Organic Act and reiterate the purposes which had already been set forth clearly in the Act. For example, Regulation 2 provided that public forest service reservations are established "to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and ensuring conditions favorable to continuous water flow." 24 L.D. 589 (June 30, 1897).

In 1906, the Department of Agriculture published its Forest Reserve Use Book. On page 13, the Use Book stated:

"Forest reserves are for the purpose of preserving a perpetual supply of timber for home industries, preventing destruction of the forest cover which regulates the flow of streams, and protecting local residents from unfair competition in the use of forests and range.

We know that the welfare of every community is dependent upon a cheap and plentiful supply of timber; that a forest cover is the most effective means of maintaining a regular streamflow for irrigation and other useful purposes, and that the permanence of the livestock industry depends upon the conservative use of the range." *The Use of the Forest Reserves*, p.13 (1906).

It is for the preservation of these forest purposes that the rules and regulations mentioned in the Use Book were required. Thus, the Use Book continues:

"The continued prosperity of agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future use of these resources under business-like regulations, enforced with promptness and effectiveness, and common sense." *Id.*

The Forest Service itself recognized the basic purposes of national forests as established by the Organic Act in the Report of the Chief Forester in 1913. The report stated:

"The national forests are set aside specifically for the protection of water resources and the production of timber" p. 10.

. . . The aim of administration is essentially different from that of a national park, in which economic use of material resources

comes second to the preservation of natural conditions on aesthetic grounds." p. 11.

In support of its positions, the United States cites several administrative manuals, letters, and other documents dealing with recreational, aesthetic, scenic, and wildlife and fish uses of the forests. From an examination of these citations it cannot be denied that recreation and related uses have been considered proper and lawful uses of the forests. As an example, the United States cites from page 8 of the 1902 Forest Reserve Manual to the effect that:

"All law abiding people are permitted to travel in forest reserves for the purpose of prospecting, surveying, to go to and from their own lands or claims, or for pleasure and recreation."

Rather than constituting an expanded administrative interpretation of the purposes of the national forests, this section merely recognizes that persons may enter the forests for lawful reasons, including recreation. The section cannot be read, however, as an administrative expansion of the forest purposes.

The United States also places reliance on a statement in the Use Book that:

"... hotels, stores, mills, summer residences and similar establishments will be allowed upon reserved lands wherever the demand is legitimate and consistent with the best interests of the reserve." *Use of the National Forest Reserves*, p.49 (1905).

But again, this statement stands for the proposition that certain recreational, and related uses may be allowed if consistent with the best interests of the forest. It does not establish the use as a purpose.

In summary, it is not argued that recreation, fishing and hunting and other related activities are not appropriate uses subject to regulation by the Forest Service. Indeed, the Organic Act has always allowed lawful and proper uses on the forest. The provisions advanced by the United States, however, cannot be understood to expand forest purposes. Indeed, if examined in context, the sources cited by the United States support the contrary conclusion.

3. Case law does not support the proposition that reserved rights in a national forest arise for purposes other than watershed protection and timber maintenance.

The United States cites several cases which it claims support its contention that various agency-sponsored uses have been judicially affirmed as valid forest purposes. However, an examination of these cases reveals that none of them indicate that forests were established for any but the limited purposes of watershed protection and timber preservation. Rather, the cases support the distinction recognized by the New Mexico Supreme Court between proper forest uses subject to regulation, and purposes for which its forest lands may be withdrawn.

For example, the government cites *McMichael v. United States*, 355 F. 2d 283 (9th Cir. 1965), in support of its contentions. In that case, the defendants challenged the validity of certain regulations, stating that, since they were not designed to protect the forests from destruction, they

were beyond the authority of the Secretary to adopt. The court, however, upheld the regulations on the theory that the Secretary's authority to regulate occupancy and use of the forests was not confined to regulations necessary to preserve the forests from destruction.

Nevertheless, the court did not say anything that would indicate that recreation was somehow made a purpose of the forest because it was a lawful, regulable forest use. Instead, the court recognized that administrative interpretation of the Organic Act has always viewed recreation as no more than a legitimate *use*. Thus, the court stated:

"The consistent administrative interpretation of Section 551, has been that while recreational considerations alone will not support the establishment of a national forest, they are appropriate subjects for regulation." 355 F. 2d at 285.

The United States advances this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), as the most compelling in support of its assertion that recreation and other uses are valid purposes for which the Gila National Forest lands were withdrawn from the public domain.

The United States relies heavily upon the following statement made by the Master in *Arizona v. California*, 373 U.S. 546 (1963):

"There are eleven national forests in the lower Colorado River Basin. They were established for the following purposes: (1) the protection of watersheds and the maintenance of natural flow in streams

below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public." Report of Special Master, p. 96.

This was the only time the Master touched upon the subject of national forests purposes in his long report. Furthermore, unlike the Master, the Supreme Court did not specifically address the issue of the purposes of the national forests.

In its opinion in *Arizona v. California*, this Court made the following statement about the Master's resolution of the reserved rights claims of the United States:

"We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian reservations." 373 U.S. at 595.

Regarding the Master's decree, the Supreme Court said:

"While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, fail-

ing which the Court will prepare and enter an appropriate decree at the next Term of Court." ID., at 602.

The decree ultimately adopted by this Court made no reference to the purposes for which national forests were established. See *Arizona v. California*, 376 U.S. 340 (1964). Rather, the decree to the Gila National Forest (in the Gila River drainage) reserved waters sufficient "... to fulfill the purposes of the Gila National Forest" *Id.* at 350. The purposes were not enumerated, just as they were not litigated. Thus, the Court's holding, in effect, does no more than state the basis of the issue now before the Court; that is, what are the purposes of the Gila National Forest to which reserved rights appropriately appertain.

Furthermore, an examination of the transcript itself indicates that the Special Master did not have the question of valid forest *purposes* before him when he issued the statement set forth above. The footnote to the Master's statement refers the reader to that portion of the transcript upon which the Master based his finding, two pages of testimony of B. Russell Lyon, Chief of Hydraulics and Water Improvement for the Intermountain Region of the National Forest Services *Arizona v. California*, Tr. pp. 16014-16015). Mr. Lyon's testimony clearly indicates he was talking about forest uses, not purposes:

"Q: Mr. Lyon, generally what are the uses which are made of he national forests?;

A: The national forests are used for"

Thus, the question of whether recreation and other forest uses were valid forest purposes within the meaning of the Organic Act was neither raised nor determined,

even by the Master. In light of the fact that this Court's opinion in *Arizona v. California* is devoid of any reference to forest purposes, and in view of the qualifications which this Court placed on its approval of the Master's findings and conclusions, it cannot be tenably argued that *Arizona v. California* settled the issues in this case.

Other than the decision by the New Mexico Supreme Court in this case, the most recent decision construing the purposes for which lands can be withdrawn from the public domain to establish national forests came in the consolidated cases in the state district court in Colorado resulting from this Court's decisions in *United States v. District Court in and For the County of Eagle, et. al.*, 401 U.S. 520, (1971) and *United States v. District Court in and For Water Division No. 5, et. al.*, 401 U.S. 527 (1971). The Special Master in these cases is Mr. Michael White, a visiting water law professor at the Denver University School of Law. Noting the essence of the Organic Act of 1897, Mr. White concluded that:

"... The statement of purposes clearly indicates that the forests were designed to conserve the watershed for the benefit of water users below the forest as well as to preserve the bountiful supplies of timber therein from destruction. No mention is made of any recreational, aesthetic, or wildlife and fish purposes established by the Organic Act of 1897. The words of the statute are clear and no broader interpretation or effect can be made than that which appears on their face. *Partial Master-Referee Report Regarding the Claims of the United States of America*, 200-201.

4. The Multiple-Use Sustained-Yield Act does not provide a basis on which to predicate reserved rights for instream uses on national forest lands prior to its enactment in 1960.

The United States contends that enactment in 1960 in the Multiple-Use Sustained-Yield Act demonstrated that Congress intended in the Creative and Organic Acts that national forests be established for more than the purposes of timber production and watershed protection. The government contends in effect that the Multiple-Use Act reaffirmed and codified the administrative policy of the Forest Service which the government contends support its assertions of reserved rights for broader purposes. However, neither the Multiple-Use Act nor its legislative history indicate that Congress intended the Creative and Organic Acts to sanction withdrawal of forest lands from the public domain for any other purposes than for timber preservation and watershed protection.

In pertinent part, the Multiple-Use Act provides:

"It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of Sections 528-531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established and set forth in Section 475 of this title." 16 U.S.C. §528 (1970).

This language demonstrates that the Multiple-Use Act was intended to establish new and additional purposes for the forests as of the date of its enactment in 1960. In light

of its express statement that the purposes which it establishes are supplemental to those of the Organic Act, it cannot be read as a reaffirmation of a pre-existing congressional policy.

The legislative history of the Multiple-Use Act supports this conclusion. The report of the House Committee specifically addressed the language set forth above. It stated:

"Thus, in any establishment of a national forest, purposes set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest [under the 1960 Act] if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 Act." House Rept. No. 1551, or House Rept. 10572, April 25, 1960, 86th Cong. 2nd Sess. p. 4.

The House Report thus expressly recognizes the limited purposes of the Organic Act and explains that the new purposes set out in the Multiple-Use Act are "additional." It necessarily follows that they did not exist under the terms of the Organic Act.

The Committee Report also recognized that recreation was merely a lawful and regulable use of the national

forests under the Organic Act. A letter from E. L. Peterson, Acting Secretary of the Dept. of Agriculture, which was included in the report, stated in part:

"The authority to administer recreation and wildlife habitat resources of the national forests has been recognized in numerous appropriation acts and comes from the authority contained in the Act of June 4, 1897, to regulate the "occupancy and use" of the national forests." *Id.*

The Court in *West Virginia Div. of Izaak Walton League v. Butz*, 522 F. 2d 945 (4th Cir. 1975), reached the same conclusion:

"In effect appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds . . ."

". . . [T]he Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language: "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897." (U.S.C. §475.).

". . . From our review of the material at hand we are satisfied that in enacting this legislation Congress did not intend to jettison or repeal the Organic Act of 1897. We are equally satisfied that this Act did not

constitute a ratification of the relatively new policy of the Forest Service . . ." 522 F. 2d at 953-54.

In summary, neither the Multiple-Use Act nor its legislative history can be read as an expansion of the limited purposes of the Organic Act, but only as an expansion of purposes for national forests as of 1960.

B. The United States is not entitled to reserved water rights for the purpose of providing water for private uses on the forest lands by permittees of the Secretary of Agriculture.

The United States also asserts reserved rights for uses made by private individuals on forest lands, namely stockowners. However, it is clear that use of water by private persons on forest lands is governed by the principles of prior appropriation, despite the withdrawal and reservation of the lands for special government purposes.

Congress provided in the Organic Act of 1897 that:

"All waters within the boundaries of national forests may be used for domestic mining, milling, or irrigation purposes, under the laws of the state wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." 16 U.S.C. §481 (1970).

Based on the above provision, the 1936 Forest Service manual provided that "rights to the use of water for na-

tional forest purposes will be obtained in accordance with state laws."

Reservation doctrine rights later emerged side by side with prior appropriation rights, and along with the rights of miners and others who occupied and used national forest lands, the government had the right to the use of so much water as was implicitly necessary to satisfy the purposes for which the lands were withdrawn.

In contrast to the contention of the United States that it is now entitled to reserve rights to water for private uses on forest lands, the Forest Service continued to recognize that private rights as opposed to government reserved rights, must be obtained under state law. Thus, the Forest Service maintained its requirement that any water-storage or water-transmission permittee on national forest lands obtain a state water right permit. Forest Service Handbook § 2755.54 (Sept. 1958); See C. Wheatley and C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 207 (1969).

The United States complains that the decision of the New Mexico Supreme Court, consistent with the above principles, would require each stockowner holding a federal grazing permit to obtain an individual adjudication of his or her water rights under state law. (Petition p. 19). However, as New Mexico points out in its brief in opposition to the government's petition:

"The district court's decision provides for the adjudication of rights to permittees when the facts will show that the water uses have been made by them instead of the Forest Service. With respect to stock water, New Mexico law provides that up to ten

acres may be impounded without the necessity of obtaining a permit. Of the 22 claims to water rights for stock watering purposes made by the United States, none would require an impoundment of more than ten acre feet. New Mexico law places no limit on annual consumption from such impoundments . . ." Brief of the State of New Mexico in Opposition, p. 6, fn. 4.

C. The New Mexico Supreme Court Decision does not preclude or hinder the ability of the United States or the western states to reserve minimum streamflows to protect wildlife, recreational, environmental, and aesthetic values on National Forest Lands.

The United States criticizes the New Mexico Supreme Court decision on the basis that it denies the United States essential reserved water rights and thus "will threaten the ecology and restrict the use of more than 7 million acres of national forest land in New Mexico, and would jeopardize the reserved water rights of the United States national forests throughout the West." ". . . The court's decision, unless reversed, will impede the husbandry and inhibit the use of our national forests." (Petition, p. 6).

In fact, the New Mexico Supreme Court decision does not preclude or inhibit federal and state initiatives to secure minimum streamflows to protect recreational, wildlife, and other values of the national forests. Indeed, the State of New Mexico has suggested several alternatives by which the United States could properly predicate reserved water rights for recreation and fish purposes. For example, New Mexico suggests the Forest Service could

submit its claims under the Multiple-Use Sustained-Yield Act of 1960. Brief of the State of New Mexico in Opposition, p. 17. The Multiple-Use Act provides that as of 1960 national forests shall "be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes."¹

In this regard, the recent decision of the Master in the consolidated cases in state district court in Colorado resulting from this Court's decisions in *United States v. District Court in and For the County of Eagle, et. al.*, 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971), is again illuminating. While the Master found, consistent with the New Mexico Supreme Court decision, that the United States did not have reserved water rights for minimum streamflows for recreation and fish and wildlife purposes on the basis of the Organic Act of 1897, he concluded that the Multiple-Use Act did not apply only to forests established after the date of its enactment, but to all forests existing as of that date as well. Further, the Master found as follows:

"Under the reservation doctrine, water is available to accomplish the purposes of the reservation. As of June 12, 1960, the Multiple-Use Act broadened the purposes of the national forests. Thus, as of that date, reserved water could be utilized in sufficient amounts to satisfy the outdoor recreation, range, and fish and wildlife purposes of the national forests. Prior to that date, it was not, and could be utilized only to achieve the

¹. In *State of Washington v. A and C Grazing Co.*, the general adjudication referred to *supra*, the referee submitted a report to the Superior Court confirming to the United States a 1960 priority for instream flows relating to fish, wildlife, and recreation uses involving national forest lands.

Organic Act's purposes of improving and protecting the forest, watershed protection, and timber preservation and supply." *Partial Master-Referee Report Regarding the Claims of the United States of America*, 237-38.

New Mexico has outlined additional alternatives of establishing such rights by withdrawing the forest lands pursuant to the National Parks Service Act, or by executive order transferring the lands to the National Parks Service for concurrent administration under the Act. New Mexico suggested in the alternative that the United States could withdraw the beds and banks of the Rio Mimbres and its tributaries under the Wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. §1271, et. seq.(1975).

If the New Mexico Supreme Court decision is upheld by this Court, it will also not preclude the exercise of state prerogatives to establish minimum streamflow on National Forest lands. Indeed, in spite of intense competition for water in the West, a number of western states have taken significant steps to protect instream values. R. Dewsnup and D. Jensen, *State Laws and Instream Flows* (Prepared for Fish and Wildlife Service) (1977). These state strategies include legislative protection of scenic rivers, legislative designation of quality streams, statutory moratorium on new appropriations, legislative assignment of use rights to a state agency, direct reservation of instream flows, administrative moratorium on new appropriations, statutory criteria to protect instream values, conditions on water use permits, transfers, and exchanges, appropriations by a state agency, appropriations held in a trust for other uses, acquisition and re-allocation of water rights, statewide water plans, state environmental

policy acts, and state fish and wildlife coordination acts.
Id.

It is thus evident that the states share the concern for recreation and fish and wildlife values that the United States evinces. Moreover, many strategies are available to the states, and indeed have been employed in many instances by the states, to protect such instream values.

Thus, despite the cries of alarm raised by the United States in its brief, the New Mexico Supreme Court's decision should not be seen as a subtle attempt to ignore environmental concerns, but rather as an objective appraisal of the purposes for which the Gila National Forest lands could have been withdrawn pursuant to the Organic Administration Act of 1897.

CONCLUSION

The purposes for which the United States is entitled to reserved rights on the Gila National Forest lands are contained in the Organic Administration Act of 1897. These purposes are protection of the watershed for downstream users, and preservation of the timber supply. Nothing in the legislative history, the administrative interpretation or in the case law, supports the government's contentions that Congress intended broader *purposes* for the national forests, as opposed to lawful *uses* of national forest lands. In the Multiple-Use Sustained-Yield Act of June 12, 1960, Congress expanded the purposes as of that date to include recreation and wildlife and fish purposes. As the Multiple-Use Act itself states, these additional purposes were supplemental to, and not in derogation of the original purposes enumerated in the Organic Act of 1897.

Provisions of the Organic Act, subsequent case law, and the administrative interpretation by the Forest Service itself, support the conclusion reached by the New Mexico Supreme Court that private users on national forest lands must obtain water rights in compliance with the state law in which the national forest lands are situated.

A ruling upholding the New Mexico Supreme Court's decision will not impair the ability of the United States to protect such instream values as recreation and fish and wildlife. Several alternatives available to the United States have been suggested by New Mexico to accomplish this objective in the Gila National Forest lands. The existence of western state laws to protect such values further belies the contention of the United States that the New Mexico Supreme Court's decision impedes the husbandry and inhibits the use of our national forests.

The New Mexico Supreme Court's decision represents an objective interpretation of the purposes for which the Gila National Forest lands could have been withdrawn pursuant to the Organic Act of 1897. The decision should be affirmed.

It should be noted that the position that the Multiple Use Sustained Yield Act of 1960 entitles the United States to reserved rights with 1960 priorities for such purposes as recreation, fish and wildlife is not necessarily shared by all of the western states joined as *amici curiae* in this brief.

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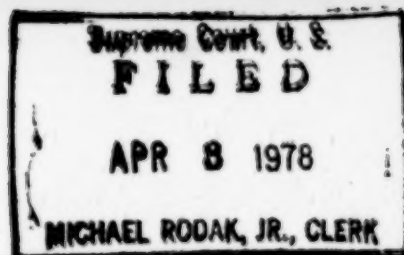
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In the
Supreme Court of the United States
OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME
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BRIEF OF AMICI CURIAE,

The Twin Lakes Reservoir and
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BRIEF OF AMICI CURIAE,

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Canal Company and The Southeastern
Colorado Water Conservancy District

STATEMENT OF INTEREST

Amici Curiae Twin Lakes Reservoir and Canal Company ("Twin Lakes") and the Southeastern Colorado Water Conservancy District (the "District") submit this brief in support of the State of New Mexico with the consent of the parties.

Twin Lakes and the District are Colorado appropriators of water arising on the White River National Forest. Pursuant to Colorado court decrees, each *amicus* collects water at altitudes of 10,000 to 11,000 feet in the mountain headwaters of the Colorado River. The watersheds which they tap were set aside as national forests by the Executive Order of August 25, 1905. Through intricate networks of canals and tunnels their water is channelled beneath the

Continental Divide to the upper reaches of the Arkansas River Basin, and then released downstream to water users in the southeastern part of the state.

The lower Arkansas Valley receives annual average precipitation of less than nine inches; its water is more heavily appropriated than any other section of Colorado; and it suffers more acutely from water shortages than does any other region of the state. The United States reserved right claims for minimum stream flows aggravate this already desperate condition.

The *amici* are both privately and publicly funded. Twin Lakes is a private mutual ditch corporation. Stock ownership entitles each holder to receive a pro-rata share of the annual water supply. Its original stockholders consisted of small farmers in Crowley County, Colorado, who conceived and constructed the Independence Pass Transmountain Diversion System during the depths of the Great Depression. Work on this project began in 1930, and water first flowed beneath the Continental Divide in 1937. During a recent ten year period, the average annual water appropriation by Twin Lakes exceeded 50,000 acre feet. A significant portion of this water is collected in late summer, fall and the winter months, when stream flows at high altitudes are much diminished.

The District is a public entity organized under Colorado law for the conservation, development, and utilization of water for agricultural, municipal and industrial uses. It initiated and obtained priorities to the use of water dating from July 29, 1957. It has entered into a contract with the United States for the repayment of costs of the Fryngpan-Arkansas Project, a federal reclamation project authorized under Public Law 87-590, 43 U.S.C. §616 (1970). Operating principles approved by Congress and adopted pursuant to P.L. 87-590, *see* H.R. Doc. No. 130, 87th Cong., 2nd Sess. (1962), provide for specified quantities of "instream" flows at most collection points on the

White River National Forest. The Government's reserved rights claim for minimum stream flows exceeds the flows designated by the operating principles. The project is designed to divert approximately 69,000 acre feet of water a year from national forest lands.

Twin Lakes and the District are resisting the reserved rights claims of the United States in the Colorado litigation occasioned by the remands of this Court in *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). Each has raised numerous defenses in opposition to the federal reserved rights claims, and each has submitted voluminous evidence showing that the United States is equitably estopped from impairing its water rights. After four years of evidentiary hearings, oral arguments and lengthy briefing, the Master-Referee issued his Report in the Colorado litigation in August, 1976. Among other determinations, he found and concluded that the national forests were not originally created for purposes which sustain federal claims for minimum stream flows, and that the doctrine of equitable estoppel does protect the water rights of the *amici*. The Master's Report in these respects has been approved and adopted by the Colorado District Court, by a decree dated March 6, 1978.

That case has not yet reached the Colorado Supreme Court, and Twin Lakes and the District find themselves in the unenviable position of seeking to protect their most vital interests through an *amici curiae* brief. The *amici* are informed that others will seek to invoke the doctrine of equitable estoppel in this case. Twin Lakes and the District respectfully urge that no issues of equitable estoppel are properly before the Court, for there has been no evidentiary showing on the record of the bases for application of the doctrine. Any pronouncement on that principle must await a supporting record.

The claims of the United States for minimum stream flows pose a direct and fundamental threat to the continuing operations of the *amici*. Like thousands of other water appropriators in the West, they have located their headgates close to the source of streams in the national forests. The United States seeks to relate its claims for minimum stream flows to the date of the reservation of particular national forests, which, in the instance of the *amici*, precedes the priority dates of the water rights which they own. If minimum stream flow rights are recognized with a priority date of the date of the creation of the forest reserve, water users such as Twin Lakes and the District would be forced to relinquish sufficient water to facilitate flows through streams below their diversion facilities. The United States Forest Service has previously indicated that about 25,000 acre feet a year, which is half the water to which Twin Lakes is entitled by its Colorado decrees, would be required to maintain the "minimum" stream flows sought by the Government. The United States' claims also substantially exceed the instream flows approved by Congress for the District's project.

Twin Lakes and the District furnish water to numerous agricultural, municipal and industrial users in arid regions of Colorado. They represent the very beneficiaries of two fundamental purposes for which the national forests were created — to secure favorable conditions of water flows, see 16 U.S.C. § 475 (1976), and to further local appropriations under state law pursuant to 16 U.S.C. § 481 (1976). The antedated federal claim for minimum stream flows obliterates these express purposes and threatens the water rights and related economies of all who acted under these Congressional enactments. The New Mexico Supreme Court's decision properly rejected minimum stream flows as a reserved right relating back to the creation of the national forests. It should be affirmed.

SUMMARY OF ARGUMENT

The implied reserved rights of the United States in the national forests are strictly limited to the amount of water necessary to fulfill the purposes for which the forests were created. See *Cappaert v. United States*, 426 U.S. 128, 141 (1976). The Creative Act of 1891, 16 U.S.C. § 471 (1976), the Organic Administration Act of 1897, 16 U.S.C. § 476, *et. seq.* (1976), related legislation, and administrative policies demonstrate that until 1960 these purposes consisted of the nurture of timber supplies and the protection of watersheds. They do not include the recreational and aesthetic purposes proposed by the United States to rationalize its claims for minimum stream flows. Reserved rights to implement recreational and aesthetic functions only arise with the passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976).

Consistent with its 1897 declaration of national forest purposes, Congress expressly granted the use of forest water to private and municipal users, such as Twin Lakes and the District. See 16 U.S.C. § 481 (1976). The Government's claim for reserved rights for minimum stream flows represents an effort to divest appropriators of Congressionally-sanctioned rights on the basis of an implied doctrine. The maintenance of minimum flows in national forest streams need not wreak such havoc. The United States enjoys the capacity to secure stream flows for the future through use of the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, *et. seq.* (1970). It also retains the power to condemn existing water rights and pay just compensation to obtain sufficient water for its new objectives.

Reserved rights for minimum stream flows are also asserted by the Government to prevent fire and control erosion. These justifications lack plausibility. But more importantly, they lack any evidentiary support whatsoever in the record of this case. They should not be considered by the Court.

ARGUMENT

I. RESERVED RIGHTS FOR NATIONAL FORESTS ARE LIMITED TO THE WATER NECESSARY TO FULFILL THE PURPOSES SPECIFIED IN 16 U.S.C. § 475 AND THEY DO NOT INCLUDE WATER FOR THE RECREATIONAL AND AESTHETIC USES URGED BY THE GOVERNMENT.

Since its inception in *Winters v. United States*, 207 U.S. 564 (1908), the reserved rights doctrine has expanded beyond Indian lands to encompass all federal reservations of the public domain. In *Cappaert v. United States*, 426 U.S. 128 (1976), the Court held:

... that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. 426 U.S. at 138.

Most importantly, the Court also cautioned that:

The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. 426 U.S. at 141.

There followed an exacting analysis to determine the minimum amount of water needed to meet the purpose for which the national monument in question was authorized.

Under the rule in *Cappaert*, the Government's reserved water rights in the national forests are defined and strictly limited by the purposes for which the forests were established. Until the passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976), these purposes were exclusively fixed by the Creative Act of March 3, 1891, 16 U.S.C. § 471 (1976), and the Organic

Administration Act of 1897, 16 U.S.C. § 475 *et. seq.* (1976). The forest purposes mandated therein by Congress consist of the nurture of timber supplies and the protection of watersheds to insure dependable water supplies for the arid areas outside the forests. The Creative Act and the Organic Act provide no support for the Government's claim that waters in the national forests are reserved for recreational or aesthetic purposes, or for the satisfaction of current environmental sensibilities. The legislative history of these Acts establishes that waters arising on the national forests were dedicated to the developing needs of the West. Only in 1960 did Congress alter the controlling statutes to add purposes which may sustain the claims of the United States. But the 1960 amendments cannot relate back or otherwise expand the purposes underlying the formation of national forests in prior years. New purposes first sanctioned in 1960 create only a reserved water right with a 1960 date.

A. *The Creative Act and the Organic Administration Act Formulated the Purposes Of The National Forest.*

Congress first authorized the establishment of national forests through the Creative Act of 1891.¹ The statute on its face did not resolve the purposes of the national forests. For the next six years forest reservations engendered a great

¹ It stated (in pertinent part):

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof. 16 U.S.C. § 471 (1976). Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976).

national controversy. In 1897 Congress set about to clarify the functions of the national forests by adopting a statement of "purposes for which national forests may be established and administered" as part of the Organic Administration Act. This provision reads in pertinent part:

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established except to *improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States*; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (Emphasis added.) 16 U.S.C. § 475 (1976).

The Organic Act is a ringing declaration of purpose, setting the criteria for the creation and operation of all national forests. It also included a section specifically authorizing the use of:

[a]ll waters within the boundaries of national forests . . . for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder. 16 U.S.C. § 481 (1976).

The national forest system, therefore, was designed to insure the proper maintenance of watersheds and the provision of ample timber; and it was also intended to facilitate the use of forest water by private appropriators, such as Twin Lakes and the District.

The United States here insists that the Organic Act sanctions an array of federal reserved water rights to the detriment of long-established nonfederal appropriators. Most damaging to water appropriators such as the *amici* are its claims for instream flows.² These flows are primarily pursued by the United States in order to promote fish and wildlife propagation and to enhance the aesthetic enjoyment of visitors to the national forests. But aesthetic appreciation, recreation, and fish and wildlife development represent functions which exceed the plain wording of the Creative and Organic Acts. Such purposes are further dispelled by the statutes' legislative history, which is a fundamental interpretative aid. See *Train v. Colo. Pub. Int. Research Group*, 426 U.S. 1, 9-11 (1976).

The provision authorizing creation of national forests was passed as § 24 of the Act of March 3, 1891, entitled "An Act to repeal the timber-culture laws, and for other purposes." The timber-culture statutes were regarded as ineffectual pieces of legislation and, in some instances, as open invitations to defraud the Government. See 21 Cong. Rec. 2537, 51st Cong., 1st Sess. (1890). At the same time, con-

²In this case the federal government characterized its instream claims as "minimum" stream flow claims. In the pending Colorado litigation referred to in the Statement of Interest above, the United States has described this claim as one for "adequate" stream flows. In similar Idaho reserved rights litigation, the federal claim for instream flows has been pushed to the ultimate. There the Forest Service asserts that *all* waters in particular streams flowing through the national forest are reserved by the United States. See *Avondale Irrigation District v. North Idaho Properties, Inc.*, Supreme Court of Idaho, decided March 15, 1978, Case No. 12174.

cern about sustained timber yields and control of water supplies impelled Congress to establish the national forests. Action was urged to:

. . . secure the magnificent forests upon these lands from destruction by axe and flame within a comparatively short period They will be needed as an important source of timber supply for the Western States for all time to come The greatest value of these forests to the present and future inhabitants of the Western States is in the assistance they render to agriculture through their influences on the water supply and the climate there is absolutely nothing, natural or artificial, that will take the place of the mountain forest as a regulator of rain-fall and water supply." See Memorial of the American Forestry Association, 21 Cong. Rec. 2537-38 (1890).

In the course of Congressional debate, Representative Flower of New York elaborated on the objectives of the statute as follows:

The more you preserve the timber at the headwaters the better you will be able to restrain the floods at its mouth and along its banks, and the better you will be able to protect the property of the people living in its fertile valleys.

. . . . These streams someday or other will be diverted from their beds for irrigation purposes, and will make fertile the lands in the Rockies and the Nevadas, besides which it will prevent a great deal of the suffering from overflows.

The more careful the preservation of the timber at the fountain heads of the stream the better it will be for the West and South and for the people who live in the valleys through which these great rivers flow.

. . . . Now, Mr. Speaker, I think that the man who cuts trees on the headwaters of these streams in such a way as to seriously diminish the timber commits a crime against the Western farmer. 22 Cong. Rec. 3616 (1891).

By 1897 approximately 17 million acres had been set aside as national forests. See 30 Cong. Rec. 908, 919 (1897). In 1896 the Secretary of the Interior in conjunction with the National Academy of Sciences appointed a blue-ribbon committee of scientists to examine the national forests and recommend changes in policy. This action reflected apprehension that the national forests were insufficiently attended by the Federal Government and consequently suffered from uncontrolled fires, grazing, and timber cutting. See The Report of a Committee Appointed by the National Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States to the Secretary of the Interior, S. Doc. No. 105, 55th Cong., 1st Sess. (1897). The Committee recommended, among other proposals, that the President reserve an additional 21 million acres in Wyoming, Utah, Montana, Washington, Idaho, and South Dakota. On February 22, 1897, President Cleveland issued an executive order reserving the land designated by the Committee. See 30 Cong. Rec. 900 (1897). These reservations provoked vehement outcries from Western Congressmen, who protested that the boundaries were drawn indiscriminately, and that the livelihoods of thousands of settlers within the new reservations were imperilled. See 30 Cong. Rec. 900-902, 908-912 (1897).

Congress reacted by suspending the President's executive order of February 22, 1897, by defining the purposes for which the forests could be reserved, and by adopting a charter for forest management and economic uses within the forests.³ Hence, the statement of purposes, 16 U.S.C. §

³See generally G. Pinchot, *A Primer of Forestry*, at 85-87 (1905); J. Ise, *The United States Forest Policy*, at 130-38 (1972).

475 (1976), was the centerpiece of a comprehensive design to regulate all national forests. In order to respect the Congressional temper, it must be read as a restriction of implied federal prerogatives.

The Congressional debates and Committee reports indicate that Congress conceived the national forest system as a means to protect timber and to conserve the capacity of watershed lands to produce a steady supply of water. Thus, Senator White, from California, remarked:

We are interested, as Senators have said, in the preservation of the forests; we are interested in conserving the water supply. 30 Cong. Rec. 917 (1897).

Representative McRae from Arkansas, one of the authors and principal sponsors of the 1897 Act, expanded at length upon the need for national forests:

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so they will not rush to the streams in torrents in the spring and early summer. We all know that in a well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

As long as the forests stand, the branches, fallen leaves, and roots will hold much of the rain and snow until summer, and thus furnish water not only for navigation of our rivers, but also for the irrigation of the deserts.

....

The objects for which the forest reservation should be made are the protection of the forest growth against destruction by fire and axe and preservation of forest conditions upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to maintain favorable forest con-

ditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, the mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they are established (Emphasis added) 30 Cong. Rec. 966 (1897).

Thus, one of the architects of the Act discarded the notion that the national forests were "parks"; rather, he invited their controlled use for economic purposes. His outlook belies the claim that the national forests were created for recreational objectives.

Representative Ellis from Oregon emphasized⁴ the function of national forests in furnishing supplies of water to cities and other users:

They [the people of the West] believe in setting apart reasonable reservations near the head waters of the streams, if you please, especially such as afford water supplies to cities, if there be any such

⁴ Representative Ellis' remarks were amplified in the same session by Representative Loud from California, who stated:

. . . I want to say further that the only object of the forest reserves in the State of California is to retain the snows upon the mountains, so that the snows and rains of the spring shall not bring down all at once the full flood upon our valleys, where irrigation is carried on to a great extent and where it is a necessity, as it is for the production of the crops of the great San Joaquin Valley.

That is the main object of the forest reserves in the State of California. . . . 30 Cong. Rec. 1399 (1897).

. . . as was well remarked by the gentleman from Colorado [Mr. Bell] yesterday, the purpose of these forest reservations is not to save the timber for future use so much as to preserve the water supply.

. . . .

I take it, Mr. Chairman, that these reservations of forests and the setting them apart are for the purpose of preserving the merchantable timber; but that is not the real object. It is for the preservation of the water supply. 30 Cong. Rec. 1006-07 (1897).

The Report of the Committee upon the Inauguration of the Forest Policy, S. Doc. No. 105, 55th Cong., 1st Sess. (1897) — which aroused bitter controversy and inadvertently precipitated the Organic Act — articulated these same themes. The Report dwelled on the national forests as sources of timber and as geographical features affecting climates, soils, and water supplies. For instance, it said:

. . . But a well-regulated water supply is not the only thing dependent on the preservation of forests. In civilized nations the demand for lumber and other forest products is continuous, and requires systematic and intelligent forest reproduction. p. 10.

Your committee is of the opinion that it is not only desirable but essential to national welfare to protect the forested lands of the public domain, for their influence on the flow of streams and to supply timber and other forest products . . . p. 36.

It is the opinion of your committee that, while forests probably do not increase the precipitation of moisture in any broad and general way, they are necessary to prevent destructive spring floods, and corresponding periods of low water in summer and autumn when the agriculture of a large part of West-

ern North America is dependent upon irrigation. p. 36.

The Report further proposed "granting rights-of-way for irrigating ditches, flumes, and pipes, and for reservoir sites. . . ." p. 36.

What Congress did not enact is as instructive as what it did. The Organic Act represented a comprehensive rubric for the governance of the national forests. It included sections which controlled the removal of timber and stone from the national forests, see 16 U.S.C. § 477 (1976), and the ingress and egress of settlers and others, and which permitted any person to enter the national forests "for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof." See 16 U.S.C. § 478 (1976). It specifically authorizes lumbering, water appropriations, road construction, firewood gathering, prospecting, mining and domestic functions. See 16 U.S.C. § 477 (1976). Yet the 1897 Act is completely devoid of any references to wildlife, recreational or aesthetic purposes.

The Congressional debates and Committee reports on the Organic Act also stand completely mute about recreational uses of the national forests. See *e.g.*, 30 Cong. Rec. p. 908, 917, 966, 1006, 1007, 1397-1401 (1897); S. Doc. No. 105, 55th Cong. 1st Sess. (1897). The Report of the Committee upon the Inauguration of the Forest Policy, which urged an enormous expansion of the national forest system, also contained no mention of this subject. This absence demonstrates that Congress did not intend to establish the national forests to serve wildlife, recreational or aesthetic purposes. Without Congressional mandate for such purposes, there can be no companion reserved water right.

B. *Other National Forest Legislation Affirms The National Forest Purposes as Protection of Timber and Preservation of Watersheds*

Subsequent Congressional actions confirm the economic utilization of forest resources as the purpose of the national forest system. The Transfer Act of 1905, Act of February 1, 1905, 33 Stat. 628, shifting control of the national forests from the Interior to the Agriculture Department, was accomplished, because, in the view of the Secretary of the Interior, "Forestry, dealing as it does with a source of wealth produced by the soil, is properly an agricultural subject." H.R. Rep. No. 48, 58th Cong., 2d Sess. 2 (1903). On the date of the statute's enactment, the Agriculture Secretary wrote to the Chief Forester:

You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the home builder first of all; upon whom depends the best permanent use of lands and resources alike. The continued prosperity of the agricultural, lumbering, mining, and livestock interests is directly dependent upon a permanent and accessible supply of water, wood, and forage, as well as upon the present and future uses of these resources under businesslike regulations, enforced with promptness, effectiveness, and common sense. In the management of each reserve, local questions will be decided upon local grounds; the *dominant industry* will be considered first but with as little restriction to *minor* industries as may be possible; sudden changes in industrial conditions will be avoided by gradual adjustment after due notice; and where conflicting interests must be reconciled, the question will always be decided from the standpoint of the greatest good of the greatest number in the long run. See Hearings on H.R. 10572 Before the Sub-

comm. on Forests of the House Comm. on Agriculture, 86th Cong., 2d Sess. 69-70 (1960).

In 1911 Congress passed the Weeks Act, 16 U.S.C. 513 *et. seq.* (1976), which authorized the purchase of private land in the East and its inclusion in national forests when necessary to protect the watersheds of navigable rivers from clear-cutting and flooding. The Weeks Act was expanded in 1924⁵ to allow land to be purchased and added to national forests for the promotion of timber production, or the protection of watersheds important to navigation or *irrigation*. These statutes clearly reflect Congress' conception of the national forests as enclaves of practical, economic significance.

Even now, subsequent to passage of the Multiple Use Act of 1960, 16 U.S.C. § 528 *et. seq.* (1976), national forests cannot be founded or operated solely for recreational or wildlife purposes. The Multiple Use Act, while expressly validating additional purposes for the national forests, also emphasized their subordination to the original objects of the forest reserves. The House Committee Report explained:

. . . the national forests are established and shall be administered for the purposes enumerated . . . as supplemental to, but not in derogation of, the purposes of improving and protecting the forests or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in

⁵ Act of June 7, 1924, 43 Stat. 654-55, 16 U.S.C. § 569-70 (1976). The Weeks Act was designed to permit purchase of land solely for the protection of the watersheds of navigable rivers. See *e.g.*, 46 Cong. Rec. 2574-2602, particularly 2595 (1911). The 1924 legislation amended the statute to allow purchase of land around the watersheds of streams used for navigation or irrigation, and also purchase of productive timber land. It further provided under certain conditions that public lands endowed with these characteristics could be set apart and added to national forests. See *e.g.*, H.R. Rep. No. 439, 68th Cong., 1st Sess., 2, 4, 6, 8 (1924); See also 65 Cong. Rec. 6501-14, 6977-89, 10954-59, (1924).

the cited provision of the act of June 4, 1897. Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. *In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes,* but such purposes could be a reason for the establishment of the forest it [sic] there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act. (Emphasis added.) H.R. Rep. No. 1551 or H.R. Report No. 10572, 86th Cong., 2nd Sess. 4 (1960).

To this date, then, recreation and wildlife development are not purposes that will sustain by themselves the formation of a national forest. The Multiple Use Act also indicates that a national forest set aside at the current time would not be entitled to reserved water for recreation, wildlife and fish propagation in derogation of what is reasonably required to serve watershed protection needs.

C. *National Park Legislation Affirms National Forest Purposes As Protection of Timber and Preservation of Watersheds*

Since 1872,⁶ the United States has pursued a policy of reserving federal lands containing particular recreational or scenic value as national parks. This policy, and the distinction which Congress maintained between the purposes of the national parks and the forests, demonstrate the absence of any Congressional intent to reserve water for recreational and allied activities in national forests.

⁶Yellowstone National Park was established by Act of March 1, 1872, ch.24. § 1, 17 Stat. 32.

In 1897, the above-mentioned Report of the Committee upon the Inauguration of the Forest Policy recommended that parts of two forest reserves containing "features of supreme natural beauty . . . be preserved for the enjoyment and instruction of the world by creating them national parks" S. Doc. 105, 55th Cong., 1st Sess. 35 (1897). Such an approach was indeed followed. Up to 1916, when the national park service was authorized, *See* 16 U.S.C. § 1 *et. seq.* (1976), fourteen national parks had been established.⁷ The enabling legislation for these parks invariably embodied language such as that appearing in the statute creating Yellowstone National Park, which declared that the area was "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people" 16 U.S.C. § 21 (1976).

One part of this pattern was the Act of October 1, 1890, 26 Stat. 650, which the Government cites at page 32 of its brief with something less than scrupulous candor. Despite its title,⁸ this statute did not mandate a national forest. Rather it set aside lands which at the time surrounded a California state park comprising the Yosemite valley and which subsequently were incorporated into the Yosemite and General Grant National Parks.⁹ Thus, the language in this statute calling for the preservation of "natural curiosities, or wonders" and the protection of fish and game was entirely consonant with Congress' attitude toward the national parks, but hardly relevant to the purposes of national forests.

⁷These were Yellowstone, Yosemite, Sequoia, General Grant, Mount Ranier, Crater Lake, Wind Cave, Sullys Hill, Mesa Verde, Platt, Glacier, Rocky Mountain, Hawaii, Lassen Volcanic. *See* H.R. Rep. No. 1275, 63rd Cong., 3d Sess. (1915); J. Ise, *Our National Park Policy* at 118 (1961).

⁸It was called, "An act to set apart certain tracts of land in the State of California as forest reservations."

⁹*See* 21 Cong. Rec. 10752 (1897). *See also* J. Ise, *Our National Park Policy*, at 52-76 (1961).

A universal statement of national park and monument purposes was enacted by Congress as an element of the national park service authorizing statute. 16 U.S.C. § 1 *et. seq.* (1976). This Act declared, in pertinent part, that

the fundamental purpose of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

In adopting this statute, Congress consciously preserved the distinction between national parks and national forests. The House Committee on Public Lands reported:

It was the unanimous opinion of the committee that there should not be any conflict of jurisdiction as between the departments [of Interior and Agriculture] of such a nature as might interfere with the organization and operation of the national parks, which are set apart for the public enjoyment and entertainment, *as against those reservations specifically created for the conservation of the natural resources of timber and other national assets, and devoted strictly to utilitarian purposes, in the vastly greater areas, known as national forests.*

The segregation of national-park areas necessarily involves the question of the preservation of nature as it exists, and the enjoyment of park privileges requires the development of adequate and moderate-priced transportation and hotel facilities. *In the national forests there must always be kept in mind as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people.* (Emphasis supplied). H.R. Rep. No. 700, 64th Cong., 1st Sess. 3 (1916).

The same distinction permeated Congressional deliberations on other national park legislation. For instance, the House Report concerning the bill to establish Rocky Mountain National Park presented with approval comments by the president of the American Civic Association. He declared:

The primary function of the national forests is to supply lumber. The primary function of the national parks is to maintain in healthful efficiency the lives of the people who must use that lumber. The forests are the Nation's reserve wood lots. The parks are the nation's reserve for the maintenance of individual patriotism and Federal solidarity. The true ideal of their maintenance does not run parallel to the making of the most timber, or the most pasturage, or the most water power. H.R. Rep. No. 1275, 63rd Cong., 3rd Sess. 47 (1915).

During debate on this bill, Representative Taylor of Colorado observed:

. . . our people believe that the grand and rare scenic region, which is one of the most beautiful spots in the entire Rocky Mountains, can be much better administered, protected and developed by the national park service of the Interior Department as a national park than it possibly could be under the Forest Service. Forest reserves are not public playgrounds and they are not administered for recreation places. 52 Cong. Rec. 1791 (1915).¹⁰

These remarks affirm the Congressional intent to create and operate the national forests for utilitarian purposes.

¹⁰In the same exchange, Representative Kent of California, similarly stated:

It should be dedicated as a pleasure ground and a scenic attraction to all our people, and the difference between its being held under the forest reserve and under the Department of the Interior as a national park is simply this—that

They also reflect the determination of Congress to differentiate these purposes from those served by the national parks. The claims which the United States urges upon this Court should be confined to parks, for to recognize them as forests would erase this distinction to which Congress strictly adhered until enactment of the Multiple Use Act of 1960.

D. *Administrative Policies Affirm the National Forest Purposes As Protection of Timber and Preservation of Watersheds*

As the Government correctly contends, in instances of ambiguity, courts normally defer to the reasonable statutory interpretations of appropriate administrative agencies. However, the United States chooses to ignore that the practices and policies of the Forest Service, and before it, the Interior Department, in fact refute its claims for reserved instream water rights.

The 1901 Regulations of the Interior Department, then vested with management of the forest reserves, stated:

Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow [for the use of appropriators].¹¹

A Primer of Forestry, by Gifford Pinchot, Forester, published in 1905 by the Department of Agriculture, con-

as a national park the animal life will be forever free from molestation. Moreover, there will be no question of timber cutting for utilitarian purposes, but the property, which has few available commercial resources, will be held in a state of nature, and for which it is peculiarly adapted. 52 Cong. Rec. 1803 (1915).

¹¹ *Decisions of The Department of Interior Relating To The Public Lands*, U. S. Department of Interior, at 24 (1901).

tains a similar explanation of the purposes of national forests. It observed:

The forest reserves lie chiefly in high mountain regions. There are 62 in number, and cover an area (January 1, 1905) of 63,308,319 acres. *They are useful first of all to protect the drainage basins of streams used for irrigation and especially the watersheds of the great irrigation works which the Government is constructing under the Reclamation Law, which was passed in 1902. This is their most important use.* Secondly, they supply grass and other forage for many thousands of grazing animals during the summer, when the lower ranges of the plains and deserts are barren and dry. Lastly, they furnish a permanent supply of wood for the use of settlers, miners, lumberman, and other citizens. This is at present the least important use of the reserves, but it will be of greater consequence hereafter. The best way for the Government to promote each of these great uses is to protect the forest reserves from fire. (Emphasis supplied).¹²

In 1909 the Chief Forester issued a report saying:

As stated last year, the purposes of national forest administration are (1) protection against fire and trespass; (2) the harvesting of timber when mature, under such limitations as the need of a reserve for future supplies of timber and the need of watershed protection impose; (3) the maintenance and betterment of a growing crop of timber; (4) the protection of the water supply; (5) utilization of the forage crop; (6) betterment of range conditions; and (7) equipment of the property with adequate means of communication and transportation and with neces-

¹² G. Pinchot, *A Primer of Forestry*, at 86-87, (1905).

sary field quarters, in the interest of more effective protection and increased use.¹³

These pronouncements¹⁴ by national forest administrators disprove the Government's current claims. They affirm that the objectives of the national forest system have been to facilitate timber production and to protect the supply of water for municipal, agricultural, mining, and other uses—the very uses made by Twin Lakes and the District.

II. THE NATIONAL FORESTS WERE CREATED TO SERVE THE NEEDS OF APPROPRIATORS OF WATER, AND IMPLIED RESERVED RIGHTS SHOULD NOT IMPEDE THAT FUNCTION.

The national forests were established expressly to provide a source of water for irrigators, municipalities and industries. The Organic Administration Act of 1897 extended a clear invitation to appropriators to divert and use water from within the national forests. It said:

All waters within the boundaries of national forests may be used for domestic, mining, milling, or irriga-

¹³ *Report of the Forester*, U.S. Dept. of Agriculture, at 70 (1909).

¹⁴ See also the report of the Chief Forester in 1913, who articulated national forest purposes as follows:

The national forests are set aside specifically for the protection of water resources and the production of timber.

The fundamental aim in administering the national forests is to develop their resources for the permanent upbuilding of the country. The whole object of their administration would be defeated by closing the forests to development and maintaining them as a wilderness. The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on aesthetic grounds. *Report of the Chief Forester*, at 10, 11, U.S. Dept. of Agriculture, (1913).

tion purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder. (Emphasis added). 16 U.S.C. § 481 (1976).

In carving the national forests out of the public lands, Congress explicitly granted water for use under either state or federal law.¹⁵ Yet no federal laws concerning national forest water have been passed; no federal rules or regulations have been promulgated. Obviously Congress has been satisfied with the application of state water law to the national forests and the appropriations that law permits.

The implied reservation of water for national forest purposes which is asserted by the Government in this action cannot constrict Congress' express grant of forest water for private appropriators pursuing state law. Indeed, *Arizona v. California*, 373 U.S. 546 (1963), while discerning Federal reserved rights in the Gila River National Forest, clearly did not intend to destroy the water rights of state appropriators in that or any other national forest. Since the Federal claims in the national forest were judged *de minimis*, there was no conflict with or harm to state water appropriations.¹⁶ See Master's Report, *Arizona v. California* at 335.

¹⁵ See e.g. 30 Cong. Rec. 1006-07, 1399 (1897); S. Doc. No. 105, 51st Cong., 1st Sess. (1897).

¹⁶ The Government contends that New Mexico is collaterally estopped by the Special Master's findings of national forest purposes in *Arizona v. California*, 373 U.S. 546 (1963). This argument is correctly rebutted by the Answer Brief of the State of New Mexico. Twin Lakes and the District commend and adopt New Mexico's position with respect to this issue. At the same time, these amici hasten to emphasize that they were not parties to *Arizona v. California*, *supra*, and that none of the Colorado na-

Other related statutes and administrative policies confirm the United States' determination to aid the development of appropriative water rights in the national forests. The Right-Of-Way Permit Act of 1891, 43 U.S.C. § 946 *et seq.* (1970), the Right-Of-Way Permit Act of 1901, 43 U.S.C. § 959 (1970), and the Forest Right-Of-Way Act of 1905, 16 U.S.C. § 524 (1970), authorized rights of way across national forests and other public lands for ditches to carry water for agricultural, domestic, mining, milling, and electrical power purposes pursuant to state decrees. The Act of June 7, 1924, authorized the purchase and designation as national forests of private lands that would protect "streams used for navigation or for irrigation [emphasis added]. . . ." 16 U.S.C. § 570 (1964). In 1940 Congress authorized the President under certain conditions to set aside and specially protect national forest lands needed as sources of municipal water supplies. See 16 U.S.C. § 552(a) (1976).

These statutes have been utilized and relied upon by thousands of appropriators with diversion facilities inside the national forests. Indeed, the construction and operation of diversion systems within the forests would have been impossible without this right-of-way legislation and the implementation thereof by the Forest Service. The

tional forests were considered therein. Twin Lakes and the District consequently urge that any application of the doctrine of collateral estoppel which the Court may entertain in this action be carefully confined to the Gila National Forest.

In a similar vein, the *amici* reject the Government's contention that some significance attaches to the early remarks of New Mexico counsel regarding recreational uses in national forests. The consequences of these remarks would, of course, be limited to the parties to this suit and to the Gila National Forest. However, it should be noted that New Mexico sought leave of court to withdraw its comments and was permitted to argue on the merits of the issue of recreation. The United States was afforded ample opportunity to present its position and could not have been prejudiced by New Mexico's action.

Government now seeks to destroy Congressionally-mandated rights, exercised over decades in good faith by western appropriators, by twisting a doctrine born of implication to ends wholly inconsistent with the clear expressions of Congress.

Until the current reserved rights litigation in the Western states, the Forest Service never exerted any effort to interfere with private or municipal water users. Indeed, it has accommodated private and municipal water appropriations in the forest reserves with special rules. For example, a section of the Forest Service Manual issued in September, 1958, said:

Action may be taken to insure the protection of watersheds which are important supply sources for municipal, domestic, industrial, or irrigation purposes. Such action may take the form of closure against all forms of use except mining.

Forest Service policy is to restrict entry into or to restrict or prohibit uses of national forest land in municipal or other important watersheds when such action is necessary to safeguard the volume and purity of water supplies and regular flow of streams.¹⁷

Furthermore, until after 1963 the Forest Service had explicitly and consistently acknowledged the sway of state law over water in the national forests. For example, sections of the Forest Service Manual,¹⁸ issued or amended in January or February, 1960, said:

¹⁷ *Forest Service Manual*, § 2528.3 (1958).

¹⁸ Further manifestations of this policy abound. Thus, in 1936 the Manual directed that "rights to the use of water for national forest purposes will be obtained in accordance with state law." See Note, *Water in the Woods: The Reserved Rights Doctrine in National Forest Lands*, 20 Stan. Law Rev. 1187, 1194 (1968). Wheatley, *Study of the Development and Use of Water Resources in the Public Lands*, Vol. 1, at 206 (1969). A Region

The right of the States to appropriate and otherwise control the use of water is recognized, and the policy of the Forest Service is to abide by applicable State laws and regulations relating to water use.

When water is needed by the Forest Service either for development of programs, improvements, or other uses, action will be taken promptly to acquire necessary water rights.

The rights to use water for national forest purposes will be obtained in accordance with State law. This policy is based on the Act of June 4, 1897 (16 U.S.C. 481) . . .

Departmental authority to secure water rights under State laws is confirmed by the Department of Agriculture Organic Act of September 21, 1944 (58 Stat. 734). [16 U.S.C. § 526 (1976)].

A water right is a right accorded by law to make beneficial use of water. Each State has its own system of laws governing the existence, acquisition, and exercise of water rights. Water-rights systems are highly developed in 17 Western States. They are in an evolutionary stage of development in the

Five Manual Supplement issued in January, 1947, said that "forest service water uses should be protected by definite water rights obtained from the state." *Region Five Supplement To Forest Service Manual*, Subsection NF-E8-1. Volume 3, Section F of the Manual, issued May, 1953, provided "it is the policy of the Department to obtain water rights under local State laws." *Forest Service Manual*, effective May, 1953, Subsection NF-F4-1. A Manual Supplement issued by Region Two (which includes Colorado) in May, 1956, ordained that "the right to its [water's] continued use shall be secured and safeguarded in compliance with the laws of the state where the water is being diverted or stored. . . ." *Region Two Supplement To Forest Service Manual*, Subsection NF-F4-1.

Eastern States due to increasing demands and locally short supplies. The forest supervisor and others concerned with water rights must have a working knowledge of the law of the particular State as it applies to the source and the existing or intended use of water. He must know the procedure available for contesting proposed uses of water by others which conflict with national forest interests.¹⁹

The Multiple Use Act of 1960, 16 U.S.C. § 528 *et seq.* (1976), further reflects the United States' long-standing interest in assisting water appropriators in the natural forests. It provides:

Section 1 — It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. *The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title . . . (emphasis supplied).*

The purposes of the 1897 Act were, among others, to protect watersheds so that appropriators would enjoy a steady supply of water, and to ratify the use of national forest water by appropriators under state law. To the extent that reserved rights for recreation, wildlife, fish and other supplemental purposes disrupt and diminish the adjudicated rights of appropriators to forest waters, they would annul the original purposes of the national forest system. Such an upheaval does violence to the meaning and spirit of the Multiple Use Act.

¹⁹ *Forest Service Manual*, § 2514, 2514.1-2, and 2514.5 (Oct. 1965).

III. THE RESERVED RIGHTS DOCTRINE HERE DOES NOT ENCOMPASS MINIMUM STREAM FLOWS FOR RECREATION, EROSION AND FIRE CONTROL, AND CERTAIN OTHER PURPOSES PROPOSED BY THE GOVERNMENT.

The United States brief calls for minimum instream flows in order to further an assortment of supposed forest purposes. These purposes are enumerated by the Government as the promotion of recreation, aesthetics, fish, and wildlife, on the one hand, and, on the other, as certain functions that purportedly bear on the capacity of the national forests to produce timber and water — namely erosion control, fire prevention, and watershed protection. (United States brief, pages 12, 22, 29, 30.) As well, at points the Government appears to contend that minimum instream flows represent a forest purpose in their own right. (United States brief, pages 22, 30.)

The recreational, aesthetic and game-development aspects of the national forests have been considered in some detail above. Twin Lakes and the District recognize that the national forests have, in fact, been utilized over the course of decades for their recreational value. Indeed, in any area as vast as the national forests, any number of perfectly lawful, proper activities known to mankind are bound to occur, and this number is also certain to increase as time passes and new frolics gain popularity. For example, skiing, hang-gliding, hot-air ballooning, jeep-touring are a few of the relatively recent pastimes now commonly pursued in Western national forests. These new activities were obviously not contemplated as forest purposes by Congress at the creation of the forest reserves.

At least until the passage of the Multiple Use Act of 1960, recreation did not constitute a purpose of the national forest system. Rather, a remarkably consistent pattern of Congressional and administrative endeavor demonstrates that the national forests were set aside to insure adequate supplies of timber and water to aid the development of the nation. In *Cappaert, supra*, the Court exercised care in emphasizing that implied reserved rights are narrowly restricted to only the amount of water required to implement the purposes for which the federal reservations in question were created. That need is established by reference to the amount of water required as perceived at the creation of the reservation. Until 1960, recreation and related functions exceeded anything contemplated by Congress as the basis for authorizing the creation of national forests. By demanding reserved rights for an ever-expanding array of incidental forest uses, the Government is seeking to distort this doctrine from this Court's careful holding in *Cappaert, supra*.

The United States also seems to envision minimum stream flows as a forest purpose in and of themselves. This view reflects a fundamental confusion about the meaning of the statutory phrase "for the purpose of securing favorable conditions of water flows" 16 U.S.C. § 475 (1976). The legislative history of the Organic Act shows that Congress did not have minimum stream flows in mind when it framed that particular language. It did not thereby mean to say "for the purpose of securing minimum water flows in streams throughout the national forests," which would have comprised a quite different purpose from what it did actually mandate. Congress's concern, rather, was to conserve the capacity of forested uplands to retard spring snow melts, absorb sudden rainfalls, and prevent both floods and droughts in regions of the country renown for their extreme weather. This interest pervades the statements of Congressmen and of federal administrators concerning the

Creative and the Organic Acts,²⁰ and it is even acknowledged here by the United States (United States brief, pages 37-39).

Moreover, both the Congress and federal agencies have taken pains to avail forest waters to appropriators for diversion within the boundaries of the national forests.²¹ This legislation rebuffs the current efforts of the Government to divine purposes where none existed. It is simply inconceivable that Congress would have expressly encouraged farmers, miners, cities and others to enter, and use and channel water away from the heart of the national forests if it had entertained any desire to preserve or even promote the uninterrupted flow of streams down and through these woodlands.

The United States has also conjured up a need for minimum stream flows to stem erosion, control fires, and,

²⁰ For instance in 1891, the Interior Department observed:

it is of the first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where *such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.* (emphasis supplied).

Department of the Interior, Circular to Special Agents of the General Land Office, dated May 15, 1891 (reproduced at 29 Cong. Rec. 2514 (1897)). See also 22 Cong. Rec. 3616 (1890); Senate Doc. No. 105, 55th Cong., 1st Sess. 36 (1897).

²¹ See e.g. 16 U.S.C. § 481 (1976); the Right-of-Way Permit Act of 1891, 43 U.S.C. § 946 *et seq.* (1970), the Rights-of-Way Permit Act of 1901, 43 U.S.C. § 959 (1970), and the Forest Rights-of-Way Act of 1905, 16 U.S.C. § 524 (1976).

in addition, apparently to protect watersheds in ways which it fails to describe. (United States brief, page 12, 22). These particular claims represent a new departure for the United States in reserved rights litigation. They were not raised in this case prior to the appellate stages, just as they were not raised in the companion Colorado reserved rights suit.

All parties recognize that national forest purposes include the conservation of timber and the protection of watersheds. Fire prevention and erosion control are necessary to the fulfillment of these purposes. Yet the record in this case is completely bare of any evidence that minimum stream flows play any role whatsoever in serving these functions.²² These claims are simply unsupported by even the most meager shred of evidence in this case. They reflect nothing other than the inventiveness of counsel bereft of the proof necessary to sustain their position. Indeed, the most fleeting exposure to the national forests tends to dispel these contentions. The United States suggests that without minimum flows the national forests will be ravaged by destructive fires and reduced to a rutted, smoldering wasteland. (United States brief, page 12). Yet even the most casual visitor to the natural forests will testify that they generally exist in a thoroughly sound condition. Somehow, over the course of the past eighty-seven years, despite the absence of federal reserved rights for minimum stream flows, the national forests have not only managed to survive, but also to flourish.

²² Most national forest streams attain a width of only a few feet, and would constitute highly ineffectual barriers to combat fires. The Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc.*, *supra* at pp. 16-22, correctly applied a strict standard of proof to such minimum stream flow claims.

IV. THE UNITED STATES IS VESTED WITH FULL
AUTHORITY TO REALIZE ITS NEW GOALS
WITHOUT DAMAGING EXISTING WATER
USERS IN THE NATIONAL FORESTS.

If the Government now regrets the existence of private and municipal water diversion projects on national forests, it should exercise its powers of eminent domain to purchase and extinguish private and municipal water rights. Surely a federal environmental goal of the magnitude inherent in the Government claims is worthy of the federal purse.

Moreover, the Government is already equipped with an effective statutory tool to enforce the non-use of scarce water resources. The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1970), repealed all prior right-of-way statutes relating to the national forests. See 43 U.S.C. § 1701 (1970). In their place, the Act substituted a statutory scheme granting the Secretary of Agriculture discretion in permitting rights-of-way through the national forests, and discretion in imposing environmental and other restrictions on those rights-of-way which he does choose to authorize. 43 U.S.C. § 1761-66 (1970). This statute equips the United States with the power to regulate any further diversions of water from within the national forests and thereby to maintain whatever minimum stream flows it deems advisable in the forests.

This statutory authority reveals the true nature of the Government's claims here for reserved rights for minimum stream flows. They are not necessary for the future viability of the national forests, because the United States already enjoys the wherewithall to satisfy that goal. Rather, this is an enterprise aimed at depriving established appropriators of water rights which they have exercised for decades, heretofore with the cooperation and encouragement of the United States. The Government's case repre-

sents an effort to confiscate rights for which it is unwilling to provide just compensation.²³

²³ In Colorado, the United States has pursued a less than consistent policy in developing minimum stream flows. A Colorado state agency, the Colorado Water Conservation Board, is authorized to seek and obtain rights to minimum stream flows pursuant to Colorado law. See 37-92-102 (3) and 37-92-103 (4), C.R.S. 1973. In fact, this agency has undertaken a vigorous effort to secure such flows. In numerous recent applications affecting national forest streams, however, the United States has opposed the Colorado Water Conservation Board's claims for minimum stream flows. Evidently, the United States' interest is directed less at establishing minimum stream flows than in promoting its own perceived exclusive rights to water on national forests.

CONCLUSION

Twin Lakes and the District respectfully request the Court to affirm the decision of the New Mexico Supreme Court and deny the claims asserted by the United States for minimum instream flows.

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Respectfully submitted,

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